CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 **MAY 24, 1995** **NO. 21**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, May 10, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTER RELATING TO ELIGIBILITY OF COPYING MACHINES FOR PARTIAL DUTY EXEMPTION UNDER SUBHEADING 9802.00.50, HTSUS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter pertaining to the eligibility for the partial duty exemption under subheading 9802.00.50, Harmonized Tariff Schedule of the United States (HITSUS), of copying machines.

SUMMARY: Pursuant to section 625(c)(1),Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the eligibility for the partial duty exemption under subheading 9802.00.50, HTSUS, of copying machines (copiers). The ruling concerns the modification of copiers in Mexico by the reprogramming of Erasable Programmable Read-Only Memory chips ("EPROMS"), and whether such enhancements are alterations under subheading 9802.00.50, HTSUS. Notice of a proposed modification was published March 22, 1995, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after July 24, 1995.

FOR FURTHER INFORMATION CONTACT: Burton Schlissel, Special Classification and Marketing Branch (202) 482–6945.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 22, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 12, proposing to modify Headquarters Ruling Letter (HRL) 555046 dated August 5, 1988. HRL 555046 holds that "the reprogramming of a copier's memory board and EPROM and the addition of a feeder, stacker, and enhanced control panel" exceeds an alteration under 806.20, Tariff Schedules of the United States (TSUS), predecessor of subheading 9802.00.50, HTSUS. The notice included proposed HRL, 558859, prepared in response to Request for Internal Advice 52/94, from the Acting District Director, Laredo, Texas, which also pertains to the eligibility under subheading 9802.00.50, HTSUS, of copiers that were modified by the reprogramming of the EPROMS.

In determining Customs final action in this matter, consideration was given to the one comment submitted and to input received from a Customs field office.

NEW POSITION

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking HRL 555046 since the ruling holds that the reprogramming of the memory board and EPROM and the addition of a feeder, stacker and enhanced control panel, exceed an alteration under the predecessor of subheading 9802.00.50, HTSUS. It is Customs position that these operations, i.e., the reprogramming of a copier's memory board and EPROM and the addition of a feeder, stacker and enhanced control panel, qualify as an alteration under subheading 9802.00.50, HTSUS.

The facts set forth in HRL 555046, however, indicate that operations in addition to those described above and specified in the ruling's holding were performed on the exported copiers. Without additional information clarifying the extent of the other work performed, Customs is unable to rule as to whether the copiers which are the subject of that ruling are eligible for the partial duty exemption under subheading 9802.00.50, HTSUS. In this regard, we note that the complete disassembly of an exported article which results in its loss of identify or in the creation of a new or different article renders that article, upon return, ineligible for the partial duty exemption under subheading 9802.00.50, HTSUS. *See Press Wireless, Inc. v. United States,* 6 Cust. Ct. 102 (1941).

Because of the need to consider additional factors pertaining only to the request for Internal Advice 52/94 (HRL 558859), Customs also had decided to delay issuance of a ruling in that case until a later date. HRL 555046, however, is hereby revoked in accordance with the position

expressed in this General Notice. HRL 555046 is revoked rather than modified since, without additional information, we cannot determine whether or not the imported copiers covered by the ruling are eligible for the partial duty exemption under subheading 9802.00.50, HTSUS. Thus, HRL 555046 should not be relied upon as establishing that the copiers described therein either qualify or do not quality for the partial duty exemption.

Dated: May 5, 1995.

SANDRA L. GETHERS,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED RULING REGARDING COUNTRY OF ORIGIN MARKING REQUIREMENTS FOR SINGLE SPICE PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed ruling regarding country of origin marking requirements for products made from a single foreign spice ingredient.

SUMMARY: Pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to issue a ruling which specifies country of origin marking requirements pertaining to single spice products. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before June 23, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., Franklin Court, Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: David Cohen, Special Classification and Marking Branch, (202) 482–7076.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested par-

ties that Customs intends to issue a ruling which will have the effect of modifying treatment previously accorded by Customs with respect to the country of origin marking of repackaged single spice products. The proposed ruling letter is set forth in Attachment A to this document.

Customs proposes to rule that imported single-spice products (e.g. cloves, pepper) are not substantially transformed as a result of cleaning, grinding, and retail packaging operations in the United States. Therefore, the consumer who obtains the packaged spices after the above domestic processing will be the ultimate purchaser of the imported spices under Title 19, United States Code, Section 1304. Accordingly, the country of origin of the spices will be the country where the imported spices were grown and the retail container in which the ground spices is sold must be marked in accordance with section 1304 and Part 134, Customs Regulations (1 9 CFR Part 134).

Section 134.25, Customs Regulations (19 CFR 134.25), provides in pertinent part that:

> If an article subject to these requirements is intended to be repacked in new containers for sale to an ultimate purchaser after its release from Customs custody, or if the district director having custody of the article, has reason to believe such article will be repacked after its release, the importer shall certify to the district director that: (1) If the importer does the repacking, the new container shall be marked to indicate the country of origin of the article in accordance with the requirements of this part; or (2) if the article is intended to be sold or transferred to a subsequent purchaser or repacked, the importer shall notify such purchaser or transferee, in writing, at the time of the sale or transfer, that any repacking of the article must conform to these requirements.

Historically, Customs has not enforced the section 134.25 repackaging requirements consistently with respect to imported single-spice products. Some districts reportedly have demanded the repackaging certification for bulk importations of single spice products that will be further processed only by cleaning, grinding, and repackaging in the United States, while other districts reportedly have allowed the imports without repackaging certifications for these bulk products. Since the proposed ruling concludes that the operations described above do not substantially transform the foreign spices into products of the United States and that the ultimate purchaser of the foreign spices is the retail purchaser or consumer, the effect of this ruling will modify Customs past treatment of substantially identical products. Therefore, before taking this action, consideration will be given to any written comments timely received.

Dated: May 2, 1995.

JOHN DURANT,
Director,
Commerce Rulings Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC
MAR–2–05-R:C:S 735599 DEC
Category: Marking

DISTRICT DIRECTOR
UNITED STATES CUSTOMS SERVICE
127 North Water Street
Ogdensburg, NY 13669

Re: Country of origin of spices, substantial transformation; *National Juice Products Ass'n v. U.S.*; HRL 555684; HRL 734989; 19 CFR 134.25; NAFTA Article 509; HRL 733207; HRL 733945; HRL 734076; 19 CFR 134.35; 19 CFR 102.11.

DEAR SIR:

This is in response to your memorandum dated May 27, 1994, in which you seek internal advice with respect to the appropriate country of origin marking of various spices which are imported into the United States from Canada.

Facts:

In your memorandum, you indicated that your district has accepted an entry of spices imported in bags which were marked to indicate the various countries of origin. Since you believed that the goods would be simply repacked or minimally processed in the United States, your office issued a section 134.25, Customs Regulations (19 C. F. R. 134.25), marking certification request. When the certification was not provided, redelivery of the goods was ordered. At that time, the importer, Specialty Brands, indicated that no other port through which they import had requested a marking certification.

The information you provided in your internal advice request pertained to products imported by Specialty Brands. In a January 25, 1994, letter, Specialty Brands provided the following as a brief explanation of the processing performed in the United States with respect to a variety of the items that they import. The country in which each spice is grown appears parenthetically.

1. Cloves are cleaned by density to remove extraneous matter, such as stems and stones. This cleaned material is then ground to a specified granulation and packaged into a 1 oz. can (Madagascar).
2. White Pepper is initially treated with Ethylene Oxide (a sterilant gas) to reduce the microbial activity. This product is then cleaned by density to remove extraneous matter, ground and packaged into a 1 oz. can (Indonesia).
3. Rosemary Leaves are treated with Ethylene Oxide and then cracked to make the product less irregular. They are then cleaned to remove extraneous material and packaged into a large commercial bottle (France).
4. Sage Leaves are treated with Ethylene Oxide, ground, and packaged into a 1 oz. can (Turkey).
5. Thyme Leaves are treated with Ethylene Oxide and then cleaned to remove extraneous matter. They are then ground and packaged into a 2 oz. can (Spain).
6. Whole Ginger is Ethylene Oxide treated to reduce microbial activity. It is then ground, and packaged into a 2 oz. can (India).
7. Salt and Coriander are ingredients used in the blending of curry powder. The Coriander is ethylene oxide treated, cleaned, and ground. Salt and other unspecified ingredients are blended in before the spice is packaged in a 2 oz. can (Canada).
8. Foenugreek Seed is used in the whole form as a bulking ingredient. It is blended with other spices and packaged in a 2 oz. can (Canada).
9. Ground celery Seed is mixed with salt, blended, and then packaged into a large commercial bottle (Canada).

You indicated that, in your opinion, few imported spices and related products are processed sufficiently in the United States to be exempt from country of origin marking. In addition, you maintain that the simple processes at issue in this case do not transform the goods into articles with a different name, character or use nor do they cause the articles to undergo an applicable tariff shift pursuant to the North American Free Trade Agreement ("NAFTA") Marking Rules. Accordingly, you conclude that the goods should be marked after the United States processing to indicate the country of growth as the country of origin and section 134.25 should be applied with respect to the repackaging of this merchandise.

In addition, you indicated that the source country of these products changes depending on the price and availability to the importer. Consequently, you suggested that "major source marking" would be the appropriate origin marking method. It is believed that seventy-five percent (75%) of the respective spices originate in countries which could be readily identified on the retail packaging.

Upon further inquiry by this office, Specialty Brands identified the most current mixtures of ingredients and their source country(s) used in the production of the various mixed spices listed in numbers 7, 8, and 9, above (see March 15, 1995, facsimile transmission from Specialty Brands, copy enclosed). More specifically, the curry powder (number 7) contains the following ingredients (country(s) of origin are noted parenthetically):

1. Cumin seed (India)
2. Celery seed (India)
3. Mace (Indonesia)
4. Salt (U.S.)
5. Black pepper (Indonesia or India)
6. Allspice (Jamaican)
7. Pepper cayenne (U.S.)
8. Caraway (Netherlands)
9. Garlic (U.S.)
10. Cloves (Madagascar)
11. Ginger (India)
12. Foenugreek (India)
13. Coriander (Morocco)
14. Turmeric (India)

The ingredients of the pickle spice (number 8) are as follows (country(s) of origin are noted parenthetically):

1. Cinnamon (Indonesia)
2. Dill seed (India)
3. Celery seed (India)
4. Cloves (Madagascar)
5. Black pepper (Indonesia or India)
6. Mustard seed—yellow (Canada)
7. Foenugreek (India)
8. Ginger (India)
9. Bay leaves (Turkey)
10. Oil durkex 500 (U.S.)
11. Crushed red pepper (India)
12. Allspice (Jamaican)
13. Coriander (Morocco)

The ingredients of the celery salt (number 9) are as follows ingredients (country(s) of origin are noted parenthetically):

1. Celery seed (India)
2. Salt (U.S.)

Issue:

1. Whether the non-NAFTA spices that are cleaned, ground, and packaged undergo a substantial transformation in the United States, thereby excepting the spices from country of origin marking.

2. Whether the Canadian origin spices that are imported into the United States from Canada for processing and blending become products of the United States under the NAFTA Marking Rules, thereby excepting the spices from country of origin marking.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304), provides that, unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. § 1304 was "that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297, 302 (1940).

SINGLE-SPICE PRODUCTS (NON-NAFTA ORIGIN)

Part 134 of the Customs Regulations (19 CFR Part 134) implements the country of origin marking requirements and exceptions of 19 U.S.C. § 1304. Section 134.41(b), mandates that the ultimate purchaser in the United States must be able to find the marking easily and read it without strain.

Section 134.1(d), Customs Regulations (19 CFR 134.1(d)), provides that the "ultimate purchaser" of an imported article is generally the last person in tho U.S. to receive the article in the form in which it was imported. In addition, that section states that a United States manufacturer may be the ultimate purchaser of an imported article if he subjects it to a process which results in a substantial transformation of the article. Under these circumstances, section 134.36(a), Customs Regulations (19 CFR 134.36(a)), provides that the article is excepted from marking and only the outermost container of the imported product need be marked with the product's origin.

"Country of origin" is defined in section 134.1(b), Customs Regulations, as

> the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part.

A substantial transformation is said to have occurred when an article emerges from a manufacturing process with a name, character, or use which differs from the original material subjected to the process. *Torrington Co. v. United States*, 764 F.2d 1563, 1568 (Fed. Cir. 1985), citing *Texas Instruments, Inc. v. United States*, 631 F.2d 778, 782 (C.C.P.A. 1982), and *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556 (1908).

The country of origin of the non-NAFTA spices imported into the United States rests upon whether the imported non-NAFTA spices are substantially transformed as a result of the cleaning, grinding, and packaging operations performed in the United States. In *National Juice Products Ass'n v. U.S.*, 10 C.I.T. 48, 628 F. Supp. 978 (1986), the court upheld a Customs determination that imported orange juice concentrate is not substantially transformed when it is domestically processed into retail orange juice products. In that case, the concentrate was mixed with water, orange essences, orange oil and in some cases fresh juice and either packaged in cans and frozen or pasteurized, chilled and packed in liquid form. Customs found, and the court agreed, that the further processing of the juice did not produce an article with a new name, character or use because the essential character of the final product was imparted by the basic ingredient, the orange juice concentrate. The court stated that

> [t]he retail product in this case is essentially the juice concentrate derived in substantial part from foreign grown, harvested and processed oranges. The addition of water, orange essences and oils to the concentrate, while making it suitable for retail sale, does not change the fundamental character of the product, it is still essentially the product of the juice of oranges. *Id.* at 61, 628 F. Supp. at 991.

Similarly, in Headquarters Ruling Letter (HRL) 555684, dated January 18, 1991, Customs determined that raw cheese, imported into Panama did not undergo a substantial transformation when processed into grated cheese, and therefore was not entitled to receive duty-free treatment under the Caribbean Basin Initiative when imported into the United states since it did not become a product of Panama. In making this determination, Customs cited to the rationale in *National Juice Products* stating that the change of the cheese from raw to grated is only minor and does not change the fundamental character of the cheese. *See also* HRL 734989, dated June 23, 1993, in which Customs reiterated the position of HRL 555684 and *National Juice Products*.

In this case, we find that the imported non-NAFTA spices are not substantially transformed when they merely undergo cleaning, grinding and packaging operations in the United States. Therefore, the consumer who obtains the packaged spices after the domestic processing is the ultimate purchaser. The imported spices after being further processed into ground spices still have the essence of the spices as imported even though they have changed from a solid mass to a powder-like form as a result of the processing. The operations performed in the United States (cleaning by gas treatment or otherwise, grinding, and packaging) are, in our opinion, minor finishing operations which do not result in any significant change in the character of the imported spices. Accordingly, the country of origin of the non-NAFTA ground spices is the country where the imported spices were grown and the retail container in which the ground spices is sold must be legibly, conspicuously, and permanently marked with the foreign origin of the spice.

1. Cloves—Madagascar
2. White Pepper—Indonesia
3. Rosemary Leaves-France
4. Sage Leaves—Turkey
5. Thyme—Spain
6. Ginger—India

Since the imported spices are processed and then repacked into retail containers in the United States, the certification requirements of section 134.25, Customs Regulations (19 C.F.R. § 134.25), are applicable. Section 134.25 provides in part that:

> If an article subject to these requirements is intended to be repacked in new containers for sale to an ultimate purchaser after its release from Customs custody, or if the district director having custody of the article, has reason to believe such article will be repacked after its release, the importer shall certify to the district director that: (1) If the importer does the repacking, the new container shall be marked to indicate the country of origin of the article in accordance with the requirements of this part; or (2) if the article is intended to be sold or transferred to a subsequent purchaser or repacker, the importer shall notify such purchaser or transferee, in writing, at the time of the sale or transfer, that ar repacking of the article must conform to these requirements.

MIXED SPICES (NON-NAFTA ORIGIN ARTICLES)

Based on the most current information Customs could obtain from Specialty Brands (March 15, 1995, facsimile transmission), the finished curry powder, pickle spice, and celery salt will be produced in the United States from ingredients that originate from non-NAFTA countries with the exception of pepper cayenne, garlic, salt, and oil durkex produced in the United States and yellow mustard seed produced in Canada.

Customs has found a substantial transformation when articles lose their separate identity when incorporated into a new and different product. *See* HRL 733207, dated November 21, 1990 (blending of plant and flower materials to produce potpourri was sufficient to effect a substantial transformation); HRL 733945, dated March 26, 1991 (blending of various ingredients to produce a hair coloring product deemed a substantial transformation) and HRL 734076, dated September 10, 1991 (tomato powder blended with other ingredients according to a designated recipe held to be a substantial transformation). Consistent with these rulings, Customs finds that the production of curry powder entailing the mixture of the fourteen (14) spices noted above pursuant to a specific proprietary formula constitutes a significant processing operation in which the name, character, and use of the individual components will change. In addition, the blending of the various non-NAFTA origin spices pursuant to a proprietary recipe in the production of the pickle spice results in a substantial transformation in the United States.

Similarly, the production of the celery salt which involves cleaning and grinding the celery seed and blending it with the salt creates a separately identifiable article of commerce with a name, character, and use different from the components. The celery salt provides a uniquely flavored alternative to either salt or celery seed. Furthermore, the characteristics of the components are changed as a result of blending these components together. They provide a flavor-enhancing quality to food preparations that is separate from either of the components individually. Therefore, we find that the processing of the celery and the salt to produce celery salt results in a substantial transformation.

Pursuant to section 134.35(a), the producer who substantially transforms the imported articles into a new and different product will be considered the ultimate purchaser. The article shall be excepted from marking, but the outermost container of the imported articles are required to be marked in accordance with the part 134 country of origin marking rules. As discussed previously, a section 134.25 repackaging certification may be required at the discretion of the district director.

MIXED SPICES (NAFTA ORIGIN ARTICLES)

Based on the most current information Customs could obtain from Specialty Brands (March 15, 1995, facsimile transmission), the finished pickle spice will be produced in the United States from ingredients that originate from non-NAFTA countries, with the exception of yellow mustard seed which is produced in Canada and oil durkex from the United States. As stated above, the non-NAFTA ingredients of the finished pickle spice are substantially transformed in the United States. However, Customs must apply the NAFTA Marking Rules to determine whether the Canadian-origin yellow mustard seed becomes a product of the United States.

The country or origin marking requirements for a "good of a NAFTA country" are determined in accordance with part 134, Customs Regulations, and with Annex 311 of the NAFTA, as implemented by section 207 of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (December 8, 1993) and the interim

amendments to the Customs Regulations published as T.D. 94–4 (59 Fed. Reg. 109, January 3, 1994) with corrections (59 Fed. Reg. 5082, February 3, 1994) and T.D. 94–1 (59 Fed. Reg. 69460, December 30, 1993). These interim amendments took effect on January 1, 1994, to coincide with the effective date of the NAFTA. The marking rules used for determining whether a good is a good of a NAFTA country are contained in T.D. 94–4 (adding a new Part 102, Customs Regulations). The marking requirements of these goods are set forth in T. D. 94–1 (interim amendments to various provisions of Part 134, Customs Regulations).

Section 134.1(b) of the interim regulations defines "country of origin" as

> the country of manufacture, production, or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a *substantial transformation* in order to render such other country the "country of origin" within the meaning of this part; *however, for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.* (emphasis added).

Section 134.1(j) of the interim regulations, provides that the "NAFTA Marking Rules" are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. Section 134.1(g) of the interim regulations defined a "good of a NAFTA country" as an article for which the country of origin is Canada, Mexico or the United States as determined under the NAFTA Marking Rules. Section 134.45(a)(2) of the interim regulations provides that a "good of a NAFTA country may be marked with the name of the country of origin in English, French, or Spanish.

Section 134.35(b), Customs Regulations (19 C.F.R. § 134.35(b)), states that

> A good of a NAFTA country which is to be processed in the United States in a manner that would result in the good becoming a good of the United States under the NAFTA Marking Rules is excepted from marking. Unless the good is processed by the importer or on its behalf, the outermost container of the good shall be marked in accord with this part.

In this case, since the imported yellow mustard seed is of Canadian origin (a NAFTA country), the country of origin marking requirements applicable to this spice will be based on the determination of whether the processing in the United States would cause the spice to be of United States origin pursuant to the NAFTA Marking Rules. To make this determination, a hierarchical analysis as proscribed in the NAFTA Marking Rules must be undertaken.

Section 102.11 (a), Customs Regulations (19 CFR 102.11(a)), states that

> The country of origin of a good is the country in which:
>
> (1) The good wholly obtained or produced;
> (2) The good is produced from exclusively domestic materials; or
> (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

Applying the NAFTA Marking Rules to the Canadian yellow mustard seed and the processing to be performed in the United States, no determination of country of origin can be made under section 102.11(a) of the interim regulations. The finished product, pickle spice, is neither wholly obtained or produced in a single country as is required under section 102.11(a)(1) nor is the finished product produced exclusively from domestic materials as required under section 102.11(a)(2).

Section 102.11(a)(3) first requires that each foreign material incorporated in the good undergoes an applicable tariff shift pursuant to section 102.20. Yellow mustard seed is classified under subheading 1207.50.00, Harmonized Tariff Schedule of the United States (HTSUS). The finished pickle spice is classified under subheading 0910.91.00, HTSUS. The applicable tariff shift rule for finished pickle spice is as follows:

HTSUS	Tariff shift and/or other requirements
09.04–09.10	A change to heading 09.04 through 09.10 from any other chapter, or
	A change to crushed, ground, or powdered products of heading 09.04 though 09.10 from within chapter 9, if put up for retail sale; or
	A change to subheading 0910.91 from any other subheading, provided that a single spice ingredient of foreign origin constitutes no more than 60 percent by weight of the good.

The processing of the yellow mustard seed into pickle spice meets the first applicable tariff shift rule which requires a change to heading 09.04 through 09.10 from any other chapter. Since the yellow mustard seed is classified under subheading 1207.50.00, HTSUS, it will undergo the applicable tariff shift when it is processed into the finished pickle spice. Consequently, the yellow mustard seed will become a good of the United States pursuant to the NAFTA Marking Rules.

Pursuant to section 134.35(b), since the yellow mustard seed will be processed by the importer, there is no requirement to mark the outermost container of the yellow mustard seed with the country of origin when imported. Furthermore, since the finished product will become a good of the United States pursuant to the NAFTA Marking Rules, the finished product is excepted from country of origin marking.

Holding:

For purpose of 19 U.S.C. 1304, the domestic processing of the non-NAFTA single-spice products which includes cleaning, grinding, and packaging for retail sale does not constitute a substantial transformation. Accordingly, the ground single-spice products which are repackaged must be marked with their foreign country of origin pursuant to the requirements of 19 U.S.C. 1304 and 19 CFR 134.35.

The processing of the curry powder, the pickle spice, and the celery salt in the United States results in a substantial transformation of the various non-NAFTA ingredients. The processing of the yellow mustard seed (Canadian origin ingredient) into pickle spice in the United States will result in the product also becoming a good of the United States pursuant to the interim NAFTA Marking Rules (19 CFR Part 102). Accordingly, the finished curry powder, pickle spice, and celery salt will be excepted from country of origin marking pursuant to part 134, Customs Regulations.

JOHN DURANT,
Director,
Commercial Rulings Division.

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 5–1995)

AGENCY: U.S. Customs Service, Department of the Treasury,

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of April 1995 follow. The last notice was published in the CUSTOMS BULLETIN on May 10, 1995.

Corrections or information to update files may be sent to:

U.S. Customs Service
IPR Branch
1301 Constitution Avenue NW (Franklin Court)
Washington, DC 20229

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: May 10, 1995.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

05/04/95 U.S. CUSTOMS SERVICE PAGE 1
17:28:49 IPR RECORDATIONS ADDED IN APRIL 19952 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9500047	19950411	20150411	LOCKET SUPRISE KAYLA	MATTEL INC.	N
COP9500048	19950411	20150411	DARK CLAW TOY VEHICLE	MATTEL INC.	N
COP9500049	19950412	20150412	COLLECTION OF ORNAMENTS -1995	CHRISTOPHER RADKO, STARAD, INC.	N
COP9500050	19950412	20150412	COLLECTION OF ORNAMENTS -1994	CHRISTOPHER RADKO, STARAD, INC.	N
COP9500051	19950412	20150412	COLLECTION OF ORNAMENTS -1993	CHRISTOPHER RADKO, STARAD, INC.	N
COP9500052	19950412	20150412	COLLECTION OF ORNAMENTS -1992	CHRISTOPHER RADKO, STARAD, INC.	N
COP9500053	19950412	20150412	COLLECTION OF ORNAMENTS -1991	CHRISTOPHER RADKO, STARAD, INC.	N
COP9500054	19950412	20150412	GARFIELD	PAWS INCORPORATED	N
COP9500055	19950412	20150412	GARFIELD & ODIE	PAWS INCORPORATED	N
COP9500056	19950412	20150412	GARFIELD, JON & LIZ	PAWS INCORPORATED	N
COP9500057	19950412	20150412	GARFIELD, NERMAL, ODIE & LYMAN	PAWS INCORPORATED	N
COP9500058	19950412	20150412	024-0033 AIR IMPACT WRENCH	TRADE ASSOCIATES INC.	N
COP9500059	19950412	20150412	B010-0006 COMMERCIAL SPRAY GUN	TRADE ASSOCIATES INC.	N
COP9500060	19950412	20150412	010-0006 COMMERCIAL SPRAY GUN	TRADE ASSOCIATES INC.	N
COP9500061	19950412	20150412	B024-0039 AIR RATCHET WRENCH INSTRUCTIONS	TRADE ASSOCIATES INC.	N
COP9500062	19950412	20150412	B024-0039 AIR RATCHET WRENCH INSTRUCTIONS	TRADE ASSOCIATES INC.	N
COP9500063	19950412	20150412	B024-0033 AIR IMPACT WRENCH INSTRUCTIONS	TRADE ASSOCIATES INC.	N
COP9500064	19950413	20150413	SNAKELIGHT (1)	BLACK & DECKER, INC.	N
COP9500065	19950413	20150413	SNAKELIGHT (2)	BLACK & DECKER, INC.	N
COP9500066	19950413	20150413	SNAKELIGHT (3)	BLACK & DECKER, INC.	N
COP9500067	19950413	20150413	SNAKELIGHT (4)	BLACK & DECKER, INC.	N
COP9500068	19950413	20150413	SNAKELIGHT (5)	BLACK & DECKER, INC.	N
COP9500069	19950425	20150425	CARCOOL-THE SOLAR SHIELD (RED/BLUE 1983 VERSION)	ABRAHAM LEVY	N
COP9500070	19950425	20150425	CARCOOL-THE SOLAR SHIELD (GRAPHIC ILLUSTRATION & TEXT)	ABRAHAM LEVY	N
COP9500071	19950425	20150425	CARCOOL-THE SOLAR SHIELD (SILVER 1983 VERSION)	ABRAHAM LEVY	N
COP9500072	19950425	20150425	BIKER MICE FROM MARS	KONAMI AMERICA INC.	N
COP9500073	19950425	20150425	SPARKSTER (GENESIS)	KONAMI AMERICA INC.	N
COP9500074	19950425	20150425	TINY TOON ADVENTURES WACKY SPORTS CHALLENGE	KONAMI AMERICA INC.	N
COP9500075	19950425	20150425	SNATCHER	KONAMI AMERICA INC.	N
COP9500076	19950425	20150425	THE ADVENTURES OF BATMAN & ROBIN	KONAMI AMERICA INC.	N
COP9500077	19950425	20150425	TINY TOON ADVENTURES WACKY SPORTS	KONAMI AMERICA INC.	N
COP9500078	19950425	20150425	CONTRA THE ALIEN WARS	KONAMI AMERICA INC.	N
COP9500079	19950425	20150425	ANIMANIACS (SNES)	KONAMI AMERICA INC.	N
COP9500080	19950425	20150425	ANIMANIACS (GENESIS)	KONAMI AMERICA INC.	N
COP9500081	19950425	20150425	CRUIS'N USA VIDEO GAME PROGRAM	NINTENDO OF AMERICA INC.	N
COP9500082	19950426	20150426	INTERNATIONAL SUPERSTAR SOCCER	KONAMI (AMERICA), INC.	N
COP9500083	19950426	20150426	SOCCER SUPERSTARS	KONAMI (AMERICA), INC.	N
COP9500084	19950427	20150427	GALAXY SHOOTER	SUPREME TOYS HONG KONG LTD.	N
SUBTOTAL RECORDATION TYPE			38		
TMK9500214	19950411	20070721	MOUNT'N PRAIRIE	CORE RESOURCES INC.	Y
TMK9500215	19950411	20081018	GAMEHIDE	CORE RESOURCES INC.	Y
TMK9500216	19950412	20020609	MATTA DOOR AND DESIGN	IMEX OF FLORIDA INC.	N
TMK9500217	19950412	20020407	J. MASON PRODUCTS	BEN M. HSIA MING TA SUPPLY	Y
TMK9500218	19950412	20040503	CLUB	WINNER INTERNATIONAL ROYALTY COR	Y
TMK9500219	19950412	20081220	LEBO VOYAGER	VENTURE 703, INC.	Y
TMK9500220	19950412	20020303	VOYAGER	VENTURE 703, INC.	Y
TMK9500221	19950412	20050103	VOYAGER	VENTURE 703, INC.	Y

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9500222	19950412	20021013	FLEX	FLEX EQUIPMENT INC.	N
TMK9500223	19950412	20021229	FLEX	FLEX EQUIPMENT INC.	N
TMK9500224	19950412	20020609	ST. JOHN	ST. JOHN KNITS, INC.	Y
TMK9500225	19950412	20020512	S	ST. JOHN KNITS, INC.	N
TMK9500226	19950412	20080119	S	ST. JOHN KNITS, INC.	N
TMK9500227	19950412	20051008	MARIE ST. JOHN	ST. JOHN KNITS, INC.	N
TMK9500228	19950412	20041023	ST. JOHN	ST. JOHN KNITS, INC.	N
TMK9500229	19950412	20021026	ST. JOHN	ST. JOHN KNITS, INC.	N
TMK9500230	19950412	20030914	ST. JOHN BY MARIE GRAY	ST. JOHN KNITS, INC.	N
TMK9500231	19950412	20030607	ST. JOHN	ST. JOHN KNITS, INC.	N
TMK9500232	19950412	20000505	DONA MARIA	FESTIN FOODS CORPORATION	Y
TMK9500233	19950413	19970816	MELONIZING	KOLENE CORPORATION	Y
TMK9500234	19950413	19971025	MELONITE	KOLENE CORPORATION	Y
TMK9500235	19950413	20020828	TUFFTRIDE	KOLENE CORPORATION	Y
TMK9500236	19950413	19970816	MELONITE	KOLENE CORPORATION	Y
TMK9500237	19950413	20041011	SARAH ELIZABETH	CARMEN M. VALVO	N
TMK9500238	19950425	20041213	REALM	EROX CORPORATION	Y
TMK9500239	19950425	20050110	THE CLUB	WINNER INTERNATIONAL ROYALTY	Y
TMK9500240	19950425	20060603	FULLMARK AND DESIGN	FULLMARK INTERNATIONAL (USA) INC	N
TMK9500241	19950425	20020908	HIDE A HOOK	JACK D. JENSEN	N
TMK9500242	19950425	20030817	CONFIGURATION OF A FOOD MIXER MACHINE	PREMARK FEG CORPORATION	N
TMK9500243	19950425	20090829	CONFIGURATION OF THE POWER-HEAD OF A FOOD MIXER	PREMARK FEG CORPORATION	N
TMK9500244	19950425	20010716	BLAST POINT	TONY MARTERIE & ASSOCIATES	Y
TMK9500245	19950425	20020609	SALT AIR	TONY MARTERIE & ASSOCIATES	Y
TMK9500246	19950425	20050331	KING COBRA	COBRA GOLF INC.	Y
TMK9500247	19950425	20040702	SUPERGIRL	DC COMICS INC.	Y
TMK9500248	19950426	20040807	RUSS THE ORIGINAL SPORT COMPANY	L. C. LICENSING INC.	N
TMK9500249	19950426	20040830	CRAZY HORSE LEGEND LOGO	L. C. LICENSING INC.	N
TMK9500250	19950426	20050307	RR RUSS LOGO	L. C. LICENSING INC.	N
TMK9500251	19950426	20040503	CRAZY HORSE LEGENDS	L. C. LICENSING INC.	N
TMK9500252	19950426	20040913	RUSS CLASSIC	L. C. LICENSING INC.	N
TMK9500253	19950426	20041004	RUSS SIGNATURE	L. C. LICENSING INC.	N
TMK9500254	19950426	20050207	RUSS ORIGINAL SPORT COMPANY	L. C. LICENSING INC.	N
TMK9500255	19950426	20040816	VIVID & BOTTLE DESIGN (1)	L. C. LICENSING INC.	N
TMK9500256	19950426	20040802	VIVID & BOTTLE DESIGN (4)	L. C. LICENSING INC.	N
TMK9500257	19950426	20041227	VIVID & BOTTLE DESIGN (2)	L. C. LICENSING INC.	N
TMK9500258	19950426	20041206	LIZ CLAIBORNE ROUND LOGO	L. C. LICENSING INC.	N
TMK9500259	19950426	20041025	VIVID	L. C. LICENSING INC.	N
TMK9500260	19950426	20050221	AMERICAN LEGEND CRAZY HORSE LOGO	L. C. LICENSING INC.	N
TMK9500261	19950426	20040517	CRAZY HORSE	L. C. LICENSING INC.	N
TMK9500262	19950426	20040510	WOMEN'S WORK	LIZ CLAIBORNE, INC..	N
TMK9500263	19950427	20041011	SARAH ELIZABETH	CARMEN M. VALVO	N
TMK9500264	19950427	20030511	FLOSS PLUS	TODD E. BUSHBERGER	N

SUBTOTAL RECORDATION TYPE 51

TOTAL RECORDATIONS ADDED THIS MONTH 89

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

CUSTOMS SERVICE FIELD ORGANIZATION:
SAN JOSE, CALIFORNIA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations pertaining to the field organization of the Customs Service by designating San Jose as a port of entry in the Customs District of San Francisco, California, of the Pacific Region. The change is being proposed as part of Customs continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers and the general public.

DATES: Comments must be received on or before July 10, 1995.

ADDRESS: Written comments (preferably in triplicate) may be submitted to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, DC 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, 1099 14th Street NW., Suite 4000, Washington, DC, on regular business days between the hours of 9 a.m. and 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Brad Lund, Office of Inspection and Control (202–927–0192).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the general public, Customs is proposing to amend §§ 101.3 and 101.4, Customs Regulations (19 CFR 101.3 and 101.4) by designating a four county area surrounding San Jose, California, as a port of entry for Customs purposes in the Customs District of San Francisco, California, within the Pacific Region. Part of this four county

area, Monterey, is presently listed in § 101.4(c), Customs Regulations, as a Customs station within the San Francisco District. San Jose is presently part of the port of entry of San Francisco.

The city of San Jose, California, has requested designation of the four county area surrounding San Jose as a port of entry and has stated that the efficiency in having a port of entry located in San Jose would represent a considerable saving of time and cost for the business community. The city states that firms in the South Bay Area will benefit from the advantages of having their cargo cleared at the San Jose port of entry. It also anticipates that more cargo will be shipped to the area and that the result will be additional Customs revenue and increased Federal benefits.

The request for designation has been concurred with by the Immigration and Naturalization Service of the Department of Justice and by the Animal and Plant Health Inspection Service of the Department of Agriculture. Various elected officials, local corporations and associations also support the request.

The criteria used by Customs in determining whether to establish a port of entry are found in T. D. 82–37 (47 FR 10137), as revised by T. D. 86–14 (51 FR 4559) and T. D. 87–65 (52 FR 16328). Under these criteria, a community requesting a port of entry designation must: (1) demonstrate that the benefits to be derived justify the Federal Government expense involved; (2) be serviced by at least two major modes of transportation (rail, air, water, or highway); (3) have a minimum population of 300,000 within the immediate service area (approximately a 70 mile radius); and (4) make a commitment to make optimal use of electronic data transfer capabilities to permit integration with Customs Automated Commercial System (ACS), which provides a means for the electronic processing of entries of imported merchandise. Further, the actual or potential Customs workload (*i.e.*, number of transactions per year) at the proposed port of entry must meet one of several alternative minimum requirements, among which are 15,000 passenger arrivals and 2500 consumption entries per year. Finally, facilities at the proposed port of entry must include cargo and passenger facilities, warehousing space for the secure storage of imported cargo pending final Customs inspection and release, and administrative office space, inspection areas, storage areas and other space necessary for regular Customs operations.

San Jose International Airport is currently staffed by Customs on a rotational basis. If the port of entry is approved, the rotational positions currently assigned to San Jose will be converted to permanent positions. Any relocation costs will be paid out of COBRA funds.

The request for port of entry status states that there will be several Federal Government benefits if the port of entry is approved. Approval will support the national goal of United States competitiveness by strengthening the economic competitiveness of one of the nation's most critical high technology areas. It will increase the efficiency of the

regional Customs service by improving the distribution of entries which must be cleared through the San Francisco-Oakland port and the San Jose port. It will decrease congestion on the Bay Area's freeways due to shipments going directly to San Jose International Airport. Finally, it will further the Customs goal of increased automation, since San Jose International Airport has provided the equipment necessary to supply a fully automated, highly efficient Customs port.

The proposed port of entry will be served by three major modes of transportation (air, rail and highway).

The proposed port of entry has a population of 2,167,000.

The City of San Jose has committed to the optimal use of electronic data input equipment and software to permit integration with any Customs system for electronic processing of commercial entries. San Jose International Airport has provided, at no cost to the Federal Government, computer equipment and systems which are needed to comply with the goals of the National Customs Automation Program.

According to recent statistics, San Jose International Airport has an annual workload of 92,246 arriving international passengers and 4854 formal entry releases, plus 2066 informal entry releases.

Cargo and passenger facilities have been provided for Customs operations at San Jose International Airport. The Customs facility is a 23,000 square foot modular facility in a secure portion of the airport. This facility provides the necessary administrative office space, inspection rooms and other space required for performing regular Customs operations.

Based on the information provided above, Customs believes that San Jose meets the current standards for port of entry designations set forth in T. D. 82–37, as revised by T. D. 86–14 and T. D. 87–65.

Proposed Limits of Port of Entry

The geographical limits of the proposed port of entry of San Jose would be as follows:

> All of Santa Clara, Santa Cruz, Monterey and San Benito Counties in the State of California.

If the proposed port of entry designation is adopted, the lists of Customs regions, districts, ports of entry and stations in 19 CFR 101.3(b) and 101.4(c) will be amended accordingly.

Comments

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Suite 4000, 1099 14th St. NW., Washington, DC.

AUTHORITY

This change is proposed under the authority of 5 U.S.C. 301 and 19 U.S.C. 2, 66 and 1624.

THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-related activity in various parts of the country. Although this document is being issued for public comment, it is not subject to the notice and public procedure requirements of 5 U.S.C. 553 because it relates to agency management and organization. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Agency organization matters such as this are exempt from consideration under Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Regulations Branch. However, personnel from other offices participated in its development.

WILLIAM F. RILEY,
Acting Commissioner of Customs.

Approved: April 10, 1995.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, May 11, 1995 (60 FR 25176)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–79)

FOODCOMM INTERNATIONAL, INC., PLAINTIFF *v.*
MICHAEL KANTOR, U.S. TRADE REPRESENTATIVE, ET AL., DEFENDANTS

Court No. 95–04–00385

Foodcomm International Inc. moves, pursuant to Rule 65(a) of the Rules of this Court, for a preliminary injunction to enjoin the United States Trade Representative and the U.S. Customs Service from imposing a 100 percent tariff duty on entries of boneless veal from The Netherlands during the pendency of the litigation against the Secretary of the Treasury regarding the same conduct and any appeal thereof. Defendants move for dismissal pursuant to Rules 12(b)(1) and (5) of the Rules of this Court for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

Held: This Court lacks jurisdiction to hear this case under 28 U.S.C. § 1581(i). Plaintiff's motion for a preliminary injunction is denied. The temporary restraining order issued on April 13, 1995 is revoked and this case is dismissed.

[Plaintiff's motion for a preliminary injunction is denied for lack of jurisdiction; the underlying temporary restraining order is dissolved; case dismissed.]

(Dated April 28, 1995)

Baker & McKenzie (William D. Outman, II) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Jeffrey M. Telep);* of counsel: *Dan Brinza,* Office of the General Counsel, United States Trade Representative, and *Edward N. Maurer,* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service.

OPINION

TSOUCALAS, *Judge:* On April 13, 1995, pursuant to Rule 65(b) of the Rules of this Court, Foodcomm International Inc. ("Foodcomm") requested, and this Court granted, a temporary restraining order. Plaintiff sought to enjoin the continuing liquidation of entries of veal from the Netherlands and the continuing retroactive assessment and collection by the United States Customs Service of 100 percent tariff duty on previously liquidated entries of veal from The Netherlands. Concurrently with the issuance of the temporary restraining order, the Court scheduled a hearing on plaintiff's motion for a preliminary injunction.

Subsequently, on April 25, 1995, a full hearing was held to determine whether a preliminary injunction should issue. Pursuant to Rule 65(a) of the Rules of this Court, Foodcomm filed a motion requesting a preliminary injunction to enjoin the United States Trade Representative ("USTR") and the U.S. Customs Service ("Customs") from imposing a 100 percent tariff duty on entries of boneless veal from The Netherlands

during the pendency of the litigation against the Secretary of the Treasury regarding the same conduct and any appeal thereof.

Defendants move for dismissal pursuant to Rules 12(b)(1) and (5) of the Rules of this Court for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

BACKGROUND

In 1985, the European Union ("EU") issued its "Council Directive Prohibiting the Use of Livestock Farming of Certain Substances Having a Hormonal Action" ("Directive") which prohibited imports into the EU of any meat produced from animals treated with growth hormones. In 1987, the President of the United States responded to that directive by issuing Presidential Proclamation 5759 which subjected "beef, without bone (except offal), fresh, chilled, or frozen (provided for in subheadings 0201.30.60 and 0202.30.60 of the Harmonized Tariff Schedule ("HTS")" from the EU to duties of 100 percent, as prescribed in subheading 9903.23.00. *Proclamation 5759 of December 24, 1987, Increasing the Rates of Duty on Certain Products of the European Community* ("Proclamation") 52 Fed. Reg. 49,131, (December 30, 1987). Prior to the Proclamation, beef without bone was subject only to a duty of 4.4 cents per kilogram.

The Proclamation also authorized the USTR to suspend, modify, or terminate the suspension of the increased duties upon publication in the Federal Register of his determination that such action is in the interest of the United States. *Id.* at 49,132.

In February 1994, the United States recognized that The Netherlands was free of foot and mouth disease and, as a result, Foodcomm began importing boneless veal from The Netherlands, a member state of the EU, under subheading 0201.30.60 of the HTS, the same subheading as the one addressed by the Proclamation. From June 1994 to November 1994, plaintiff made entries of boneless veal through the ports of San Francisco and Boston. These entries are the subject of this action.

Import specialists were in disagreement as to the application of the Proclamation: some applied it to boneless veal and some did not. At the request of another importer of boneless veal, Customs issued a ruling letter on October 6, 1994 in which it held that boneless veal is subject to 100 percent duties pursuant to HTS item 9903.23.00. Customs did not consult the USTR before issuing this decision. (In March of 1995, Customs consulted with the USTR and affirmed its earlier ruling.)

On December 5, 1994, after consulting with the USTR, Customs issued administrative instructions ("Customs Instructions") pursuant to which all shipments of boneless veal from the EU are to be assessed with 100 percent duties under HTS subheading 9903.23.00. The Customs Instructions also required ports to retrieve entries liquidated within the past 90 days and to reliquidate them with the 100 percent duty. Finally, the Customs instructions required all ports to issue notices of rate advance on entries of boneless veal upon which liquidation was pending.

On December 12, 1994, plaintiff received two notices of action proposing to increase the rate of duty for importations of boneless veal. Plaintiff responded on December 29, 1994, arguing that because veal is not beef, boneless veal from The Netherlands should be excluded from the imposition of 100 percent duties under HTS 9903.23.00. On March 14, 1995, the Director of the Commercial Rulings Division, United States Customs Service denied plaintiff's petition for relief.

On December 30, 1994, Customs liquidated 20 of plaintiff's entries made through the port of San Francisco between June and August 1994. Plaintiff paid the bills issued with respect to these entries on January 27, 1995.

On March 17, 1995, Customs liquidated another 10 entries made through the port of San Francisco with the 100 percent duty and issued bills for the additional duties in the amount of approximately $200,000. According to the bills, the full amount of the additional duties was due on or before April 15, 1995, with interest accruing for late payment from that date.

On March 27, 1995, plaintiff protested the liquidation of the entries made through San Francisco. Customs has not yet decided these protests.

On April 7, 1995, Customs liquidated the 24 entries made through the port of Boston. Bills for the Boston entries have been sent to plaintiff.

In sum, Foodcomm has paid Customs $230,888.43 in duties on boneless veal which has entered the United States prior to December 1994 and Customs has informed Foodcomm that it owes an additional $196,747.68 in duties for entries at San Francisco and $548,747.68 in duties for entries at Boston. The charges assessed by Customs include interest charged at a compounded rate of nine percent which has been accrued as of October 1, 1994. *Memorandum of Law in Support of Plaintiff's Application for a Temporary Restraining Order and a Preliminary Injunction* at 4.

On April 7, 1995, Foodcomm filed the complaint in this action.

DISCUSSION

Jurisdiction:

Foodcomm carries the burden of demonstrating that the Court of International Trade has jurisdiction to hear and determine this case. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Smith Corona Group, SCM Corp. v. United States*, 8 CIT 100, 102, 593 F. Supp. 415, 417–18 (1984). Plaintiff asserts that the court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i) (1988).[1] Specifically, Foodcomm claims that jurisdiction exists under subparagraphs (1), (2) and (4) of this provision.

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[1] Section 1581(i) states, in part, as follows:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

continued

Defendant contests the court's jurisdiction, asserting that plaintiff has neither exhausted the administrative remedies available nor demonstrated that the Court has jurisdiction under section 1581(i). For the reasons set out below, this Court agrees with defendant that it does not have jurisdiction to hear this case.

Section 1581(i) is a residual jurisdictional provision which grants exclusive jurisdiction to the Court of International Trade to hear issues which are not specifically covered by other subparagraphs of section 1581. This section may be invoked as a basis for subject matter jurisdiction where no other subsection of section 1581 is available or when the remedies afforded by the other subsections would be "manifestly inadequate." *See Asociacion Colombiana de Exportadores de Flores (Asocoflores) v. United States,* 13 CIT 584, 717 F. Supp. 847 (1989), *aff'd,* 903 F.2d 1555 (Fed. Cir. 1990). *See also Miller & Co. v. United States,* 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied,* 484 U.S. 1041 (1988).

Generally, challenges to classification, valuation and entry of merchandise are reviewable pursuant to 28 U.S.C. § 1581(a)[2] after the administrative remedies afforded by 19 U.S.C. §§ 1514[3] and 1515[4] have been exhausted. *United States v. Uniroyal, Inc.,* 69 CCPA 179, 182, 687 F.2d 467, 471 (1982) ("Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service.").

The denial of a protest is not a condition precedent to this court's exercise of jurisdiction in all cases. Where a plaintiff challenged a Presidential Proclamation imposing quotas on sugar imports, the Court of Customs and Patent Appeals held:

> We are persuaded that in this case, involving the potential for immediate injury and irreparable harm to an industry and a substantial impact on the national economy, the delay inherent in proceeding under § 1581(a) makes relief under that provision manifestly inadequate and, accordingly, the court has jurisdiction in this case under § 1581(i).

United States Cane Sugar Refiners' Ass'n v. Block, 69 CCPA 172, 175 n.5, 683 F.2d 399, 402 n.5 (1982); *see also Mast Industries, Inc. v. Regan,* 8 CIT 214, 221, 596 F. Supp. 1567, 1573 (1984) (quoting *United States Cane Sugar Refiners,* 69 CCPA at 175 n.5, 683 F.2d at 402 n.5).

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(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i) (1988).

[2] **§ 1581 Civil actions against the United States and agencies and officers thereof.**

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

28 U.S.C. § 1581(a) (1988).

[3] 19 U.S.C. § 1514 (1988) pertains to protests against decisions of appropriate customs officers.

[4] 19 U.S.C. § 1515 (1988) addresses the review of customs related protests.

In contrast, in the case at bar, plaintiff has not demonstrated that the remedy available under section 1581(a) is manifestly inadequate. In his affidavit, the president of Foodcomm, Mr. Joel Weinstein, asserts Foodcomm's 1994 profits and available cash would be wiped out and its ability to borrow money diminished if Customs is not enjoined from imposing the duty. *Affidavit of Joel Weinstein, Foodcomm International, Inc.* at 3. Mr. Weinstein states the assessment of duties would devastate Foodcomm's sales because, once it becomes economically infeasible for it to import boneless veal, its sales of bone-in veal would be cut as customers will only buy boneless and bone-in veal from the same source. *Id.* Mr. Weinstein also asserts Foodcomm's ability to maintain itself as a growing business concern and its business goodwill are threatened. *Id.* at 4.

The Federal Circuit has held, "mere allegations of financial harm, or assertions that an agency failed to follow a statute, do not make the remedy established by Congress manifestly inadequate." *Miller & Co.*, 824 F.2d at 964. Foodcomm has failed to provide any financial information showing its financial solvency depends upon a preliminary injunction. The Court has seen no evidence that Foodcomm's goodwill or viability as a growing concern is threatened: Foodcomm is not limited to importing veal (be it boneless or in-bone) from only The Netherlands. The mere allegations of Mr. Weinstein do not amount to a finding of manifest inadequacy of the remedy available under section 1581(a). Indeed, on March 27, 1995, Foodcomm protested the liquidation of the entries made through San Francisco.

Foodcomm cannot demonstrate that the remedy afforded by section 1581(a) is manifestly inadequate merely by claiming that it is too costly to pay the duties required as a jurisdictional prerequisite by 28 U.S.C. § 2637(a) (1988). In addition, anticipated delays alone in obtaining a decision on a protest cannot establish that section 1581(a) provides a manifestly inadequate remedy. 19 U.S.C. § 1515(b) allows an importer to request accelerated disposition of its protest. In sum, that prompt resolution of this controversy was not possible or that plaintiff must pay duties as a jurisdictional prerequisite does not make an adequate basis for invoking the Court's residuary jurisdiction.

Although this Court is inclined to agree with plaintiff's argument that the Proclamation is a retaliatory measure in response to the EU Directive and therefore is a tariff "for reasons other than the raising of revenue" pursuant to 19 U.S.C. § 1581(i)(2), this Court finds the remedy available under 19 U.S.C. § 1581(a) is *not* manifestly inadequate as the plaintiff may request an accelerated disposition of its protest pursuant to 19 U.S.C. § 1515(b) and request an immediate trial of this Court.

Therefore, this Court holds it does not have jurisdiction to hear this case and defendants' motion to dismiss this action for lack of jurisdiction is granted. Accordingly, the temporary restraining order is hereby revoked and this case is dismissed.

(Slip Op. 95–80)

SKF USA INC. AND SKF GMBH, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 93–08–00497

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record. Plaintiffs specifically contest the Department of Commerce, International Trade Administration's ("Commerce") (1) use of best information available in the calculation of constructed value; (2) requirement that the cost of material inputs obtained from related suppliers approximate arm's-length price; (3) twice adding profit with regard to inputs purchased from a related supplier, once in the calculation of constructed value for the entire subject article and again in the calculation of material costs for inputs obtained from related suppliers; (4) deduction of direct selling expenses from U.S. price in exporter's sales price comparisons; and (5) denial of a direct adjustment for home market cash discounts.

Held: Plaintiffs' motion for judgment upon the agency record is granted in part and this case is remanded to Commerce for removal of best information available from Commerce's constructed value calculation of related party inputs. All other issues are affirmed.

[Plaintiffs' motion is granted in part and denied in part; this case is remanded to Commerce.]

(Dated May 2, 1995)

Howrey & Simon (Herbert C. Shelley, Alice A. Kipel, Anne Talbot, Patricia M. Steele and *Juliana M. Cofrancesco)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Jeffrey M. Telep);* of counsel: *Thomas H. Fine, Michelle Behaylo, David Ross* and *Stacy J. Ettinger,* Attorney–Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Lane S. Hurewitz, Geert De Prest and *Myron A. Brilliant)* for defendant-intervenor, The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel, and *Joseph A. Perna, V)* for defendant-intervenor, Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, SKF USA Inc. and SKF GmbH (collectively, "SKF"), commenced this action challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce" or "ITA") final results of its administrative review concerning antifriction bearings ("AFBs") (other than tapered roller bearings) and parts thereof. *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order ("Final Results"),* 58 Fed. Reg. 39,729 (July 26, 1993), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 58 Fed. Reg. 42,288 (August 9, 1993), *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France and the*

United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews, 58 Fed. Reg. 51,055 (September 30, 1993), and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 59 Fed. Reg. 9,469 (February 28, 1994).

Specifically, plaintiffs contest Commerce's (1) use of best information available ("BIA") in the calculation of constructed value ("CV"); (2) requirement that the cost of material inputs obtained from related suppliers approximate arm's-length price; (3) twice adding profit with regard to inputs purchased from a related supplier, once in the calculation of constructed value for the entire subject article and again in the calculation of material costs for inputs obtained from related suppliers; (4) deduction of direct selling expenses from U.S. price ("USP") in exporter's sales price ("ESP") comparisons; and (5) denial of a direct adjustment for home market cash discounts.

BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders on ball bearings, cylindrical roller bearings and spherical plain bearings and parts thereof. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 20,900 (May 15, 1989).

On April 27, 1993, Commerce published the preliminary results of the subject review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 58 Fed. Reg. 25,606 (April 27, 1993).

On July 26, 1993, Commerce published the final results at issue in this case involving AFBs from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom. *Final Results*, 58 Fed. Reg. at 39,729, as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 58 Fed. Reg. 42,288 (August 9, 1993), *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 58 Fed. Reg. 51,055 (September 30, 1993), and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 59 Fed. Reg. 9,469 (February 28, 1994).

On August 24, 1993, SKF filed its summons in this case, challenging the final results with respect to Germany.

DISCUSSION

This Court must uphold final results of an ITA administrative review unless the ITA determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is defined as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed Cir. 1990).

1. *Constructed Value Calculations:*

SKF makes three arguments with regard to Commerce's calculation of constructed value. First, SKF asserts Commerce improperly resorted to best information available by increasing by eight percent all material costs for inputs obtained by related suppliers reported by SKF. Citing to the cost of production and constructed value portions of Commerce's questionnaire and its "Section D" response, as well as supplemental questionnaire and response, SKF states Commerce erred as the information allegedly not supplied by SKF had never been requested in the first place. SKF asserts it fully responded to the questions asked both in the initial questionnaire and in the supplemental questionnaire. *Brief in Support of Plaintiffs' Motion for Judgment Upon the Agency Record ("SKF's Brief")* at 14–23.

Second, SKF alleges Commerce erred in concluding that cost of material inputs obtained from related suppliers for CV purposes must approximate an arm's-length price. SKF asserts that the antidumping law does not permit the addition of an amount of eight percent for profit to approximate an arm's-length price for related supplier inputs, where transfer prices were not reported and there is nothing on the record which indicates the values reported were less than the cost of production ("COP"). 19 U.S.C. § 1677b(e)(2) and (3) (1988). SKF therefore asserts it properly reported the actual manufacturing costs incurred by related suppliers and did not report transfer prices. Further, SKF contends not all its material inputs were obtained from related suppliers; and therefore were already reported at arm's-length prices and should not have had their reported value increased for profit. As to these material inputs obtained from unrelated suppliers, SKF states it reported the actual prices it paid for the inputs. *SKF's Brief* at 23–29.

Third, SKF contends Commerce acted contrary to law by adding profit both in the calculation of CV for the entire subject article and in the calculation of material costs for inputs obtained from related suppliers. SKF asserts that only one addition of profit, in the calculation of CV for the entire article, should be made. SKF points out that it reported, in compliance with 19 U.S.C. § 1677b(e)(1) (1988), constructed values

which included profit for each class or kind of merchandise as the greater of actual profit calculated or eight percent of the sum of material and fabrication costs and general expenses. Consequently, SKF argues it was contrary to law for Commerce to additionally increase the value of all material inputs by eight percent. *SKF's Response to the Cost of Production and Constructed Value Portions of Commerce's "Section D" Questionnaire,* Public Document No. 146 at 67; *SKF's Brief* at 29–34.

Commerce concedes that its questionnaire was unclear as to whether SKF was required to report the transfer price of related party inputs or the related party's COP of the inputs. Commerce also concedes that it neither gave any indication that SKF's response was deficient nor requested transfer prices of SKF. Consequently, Commerce requests a remand in order to remove BIA from the valuation of SKF's inputs purchased from related parties in its calculation of CV. Commerce also requests a remand to consider whether it may appropriately use transfer prices if they are higher than the costs of producing the inputs and, if necessary, to request transfer prices from SKF. Unsure of its reading of *Federal-Mogul Corp. v. United States,* 18 CIT ___, ___, 862 F. Supp. 384, 403–04 (1994), *mot. granted, remanded,* 18 CIT ___, 872 F. Supp. 1011 (1994), Commerce requests instruction from this Court as to whether the minimum eight percent profit is to be added twice in the CV calculation—once on each related party input and a second time to the total cost of all inputs. *Defendant's Memorandum in Opposition to the Motion of SKF USA, Inc. and SKF GmbH for Judgment Upon the Agency Record ("Defendant's Brief")* at 3–6.

Defendant-intervenor The Torrington Company ("Torrington") asserts application of BIA was appropriate because both the statute and Commerce's questionnaire required SKF to report transfer prices for related party inputs. Torrington argues the BIA chosen was reasonable and did not involve double counting. Citing *Federal-Mogul,* Torrington states Commerce merely made certain that the appropriate COP of material inputs existed before applying the statutory profit for CV calculations. Torrington also contends related party input costs require an eight percent profit adjustment so that they represent arm's-length values. *Opposition of Defendant-Intervenor The Torrington Company to the Motion of the Plaintiffs for Judgment Upon the Administrative Record ("Torrington's Brief")* at 6–15.

Defendant-intervenor Federal-Mogul Corporation ("Federal-Mogul") agrees with the position of Torrington. *Response of Federal-Mogul Corporation, Defendant-Intervenor, to Plaintiffs' Motion for Judgment Upon the Agency Record ("Federal-Mogul's Brief")* at 4–9.

First, as to the application of BIA, this Court finds that Commerce inappropriately applied BIA. Commerce's questionnaire is ambiguous as to whether Commerce was requesting transfer prices or COP of related party inputs. *See Section D Questionnaire,* Public Doc. No. 2 at 73–74. Further, Commerce neither gave any indication that SKF's response was deficient nor requested transfer prices of SKF. Therefore,

this Court remands this issue for removal of BIA from Commerce's CV calculation. *See* 19 U.S.C. § 1677e(c) (1988).

> **(e) Constructed value**
>
> **(1) Determination**
>
> For the purposes of this subtitle, the constructed value of imported merchandise shall be the sum of—
>
> **(A)** the cost of materials * * *
>
> **(B)** an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade, except that—
>
> * * * * * * *
>
> **(ii)** the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost;
>
> **(2) Transactions disregarded; best evidence**
>
> For the purposes of this subsection, a transaction directly or indirectly between * * * [related parties] may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available * * * .
>
> **(3) Special rule**
>
> If, regarding any transaction between * * * (related parties) involving the production by one of such persons of a major input to the merchandise under consideration, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the costs of production of such input, then the administering authority may determine the value of the major input on the best evidence available regarding such costs of production, if such costs are greater than the amount that would be determined for such input under paragraph (2).

19 U.S.C. § 1677b(e).

Under 19 U.S.C. § 1677b(e)(2), Commerce is granted the discretion to disregard transfer prices, if the respondent cannot demonstrate that such prices are consistent with arm's-length prices. Clearly, however, the statute can only apply if the respondent has reported or relied upon transfer prices. SKF did not report or rely upon transfer prices, but provided manufacturing costs. Thus, this part of the statute is inapplicable.

19 U.S.C. § 1677b(e)(3) is also inapplicable in this case. This provision applies where Commerce has reasonable grounds to believe or must that the value attributed to inputs is less than the costs of producing those

inputs. Commerce has accepted cost of production as the best evidence of the value of inputs from SKF's related supplier. There is no evidence on the record and the defendant-intervenors have not presented any evidence which would suggest that the amount represented as the value of these inputs is less than the COP of the inputs.

Further, defendant-intervenors' reliance on *Federal-Mogul* is misplaced. In *Federal-Mogul*, this Court required Commerce to include the statutory minimum adjustment for profit in calculating constructed value. That instruction was based solely on 19 U.S.C. § 1677b(e)(1). After denying a profit adjustment to COP information of inputs pursuant to 19 U.S.C. § 1677b(e)(3) and disregarding arguments for a similar adjustment pursuant to 19 U.S.C. § 1677b(e)(2), the Court there stated, Commerce "is obligated to allocate profit, as well as various costs and expenses to the products under investigation. See 19 U.S.C. § 1677b(e)(1)." *Federal-Mogul*, 18 CIT at ____, 862 F. Supp. at 404.

In this case, it is the cost of production of inputs that is at issue. Thus, under both 19 U.S.C. § 1677b(e)(2) and (3), there is no adjustment for profit required in the calculation of COP of inputs. *See* discussion *supra*. However, in its calculation of CV, pursuant to 19 U.S. C. § 1677b(e)(1), Commerce must make the necessary adjustment for profit, as was done in *Federal-Mogul*. *See Federal-Mogul*, 18 CIT at ____, 862 F. Supp. at 404. As required by 19 U.S.C. § 1677b(e)(1), a minimum of eight percent profit has already been added to SKF's general expenses and cost of manufacture on the CV calculated for all subject merchandise. *SKF's Response to the Cost of Production and Constructed Value Portions of Commerce's "Section D" Questionnaire*, Public Document No. 146 at 67.

Finally, this Court does not reach the issue of whether Commerce is required to prefer, when considering related party inputs, the transfer price if it is greater than the COP. In this casel Commerce has chosen COP and SKF has provided the requested information. As the choice of COP is accordance with law and supported by substantial evidence, this Court will not remand this issue merely for Commerce to reconsider its choice in this case.

Accordingly, this issue is remanded only for Commerce to remove best information available from Commerce's constructed value calculation of related party inputs (its increase of SKF's value for inputs by a factor of eight percent for profit), leaving untouched its profit adjustment to the total constructed value made under 19 U.S.C. § 1677b(e)(1)(B)(ii). *See SKF USA-Inc., SKF France, S.A. and SARMA v. United States*, 19 CIT ____, ____, Slip Op. 95–67 at 12 (April 19, 1995).

2. *U.S. Direct Selling Expenses:*

SKF asserts Commerce erred in treating SKF's U.S. direct selling expenses as a reduction to U.S. price rather than an addition to foreign market value on exporter's sales price sales. SKF states direct selling expenses should be added to FMV as a matter of law and Commerce acted contrary to the statute and to explicit direction from this Court in deducting them from USP. *SKF's Brief* at 34–36.

While conceding that this Court has ruled adversely to its position on this point, Commerce contends it has acted consistently with 19 U.S.C. § 1677a(e)(2) (1988), rather than adding direct selling expenses to FMV pursuant to the circumstance of sale adjustment contained in 19 U.S.C. § 1677b(a)(4)(B) (1988). Commerce points out its policy has recently been vindicated by the Federal Circuit in *Koyo Seiko Co., Ltd. and Koyo Corp. of U.S.A. v. United States,* 36 F.3d 1565 (Fed. Cir. 1994), *on remand, remanded,* 1994 CIT LEXIS 213 (1994). *Defendants' Brief* at 6–8.

Citing *Koyo Seiko,* the defendant-intervenors support Commerce's position. *Torrington's Brief* at 15; *Federal-Mogul's Brief* at 9–10.

The Federal Circuit explained Commerce's practice as follows:

> Commerce's practice evidences an attempt to make mirror-image adjustments to foreign market value and exporter's sales price so that they can be fairly compared at the same point in the chain of commerce. The procedure is as follows: In an exporter's sales price transaction, after an initial exporter's sales price is calculated, that value is adjusted, *inter alia,* pursuant to section 1677a(e)(2) by deducting therefrom all selling expenses (both direct and indirect) incurred in making U.S. sales. Then, in determining an initial foreign market value, appropriate sales are identified in the home market or third country pursuant to 19 U.S.C. § 1677b(a). Next, the initial foreign market value is adjusted, *inter alia,* by deducting therefrom a "circumstances of sale" amount to account for "any difference between the United States rrice and the foreign market value," 19 U.S.C. § 1677b(a)(4), for example, direct selling expenses incurred in making home market sales. In this way, the section 1677b(a)(4) adjustment to foreign market value counterbalances the section 1677a(e)(2) adjustment to exrortar's sales price. As a result, the two parameters may be compared on equivalent terms.

Koyo Seiko, 36 F.3d at 1573.

The Federal Circuit went on to specifically uphold Commerce's reading of the statute:

> Nothing in the plain language or the legislative history of the Antidumping Act precludes Commerce's approach of adjusting exporter's sales price by deducting therefrom certain direct selling expenses incurred in the United States. Indeed, Commerce's stated rationale for its approach is well within the bounds of reasonableness. Moreover, because we recognize that Commerce is "the 'master' of the antidumping law, worthy of considerable deference," *Daewoo Elecs.,* 6 F.3d at 1516, we defer to its approach.

Id. at 1575.

Accordingly, as the law is now clear that Commerccls methodology of adjusting United States price for selling expenses, both direct and indirect, incurred with respect to ESP sales, is reasonable and in accordance with law, this Court affirms Commerce on this issue. *See SKF USA Inc., SKF France, S.A. and SARMA v. United* .States, 19 CIT ____, at Slip Op. 95–67 at 14.

3. *SKF GmbH Home Market Cash Discounts:*

SKF asserts Commerce improperly disallowed as direct adjustments to foreign market value, and treated as indirect expenses, certain of SKF GmbH's home market cash discounts. SKF contends it reported the discounts on a transaction-specific basis, according to customer number-specific payment terms which were applicable equally to all merchandise in a transaction and were adjusted to reflect actual discounts paid. SKF states its reporting was in accordance with the manner in which customers took discounts and the discounts were recorded in the company's books. SKF explains that it reported a rate of discount separately for each customer number, rates were applied to only those transactions eligible for a discount based on the relevant payment terms. Further, SKF states the actual payment of a cash discount will usually occur as a remittance of multiple invoices, and remittance of a discounted payment against several invoices cannot be traced to a specific transaction because of the manner in which customers have taken their discounts. *SKF's Brief* at 9–11; 36–42.

Commerce responds that it properly rejected the direct adjustments because they were not reported on a transaction-specific basis. Commerce treated these adjustments as indirect selling expenses because they were reported on a customer- or distributor-specific basis. *Defendant's Brief* at 8–13. Federal-Mogul agrees with the position taken by Commerce. *Federal-Mogul's Brief* at 10–15.

Torrington agrees that Commerce properly disallowed a direct adjustment to FMV, but argues that Commerce erred in allowing even an indirect adjustment to FMV for billing adjustments because they could not be identified to particular sales transactions or be limited to in-scope merchandise. *Torrington's Brief* at 15–17.

Commerce explained its methodology in the Final Results:

> [D]iscounts, rebates, or price adjustments based on allocations are not allowable as direct adjustments to price. Allocated price adjustments have the effect of distorting individual prices by diluting the discounts or rebates received on some sales, inflating them on other sales, and attributing them to still other sales that did not actually receive any at all * * *.
>
> Therefore, we have made direct adjustments for reported home market discounts, rebates, and price adjustments if (a) they were calculated on a transaction-specific basis and were not based on allocations, or (b) they were granted as a fixed and constant percentage of sales on all transactions for which they are reported. If these adjustments were not fixed and constant but were allocated on a customer-specific or a product-specific basis, we treated them as indirect selling expenses. We did not accept discount or rebate amounts based on allocations unless the allocations calculate the actual amounts for each individual sale.

Final Results, 58 Fed. Reg. at 39,759.

Commerce makes adjustments for discounts, rebates and other billing adjustments pursuant to 19 U.S.C. § 1677a (1988) and 19 U.S.C.

§ 1677b (1988), which require it to determine what price was actually charged for subject merchandise. *See Torrington Co. v. United States*, 17 CIT ____, ____, 818 F. Supp. 1563, 1578–79 (1993). More specifically, the Federal Circuit has held that, to allow an adjustment to FMV, it must be directly correlated with specific in-scope merchandise on the basis of actual costs. *Smith-Corona Group v. United States*, 713 F.2d 1568, 1580 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

This Court finds that SKF reported its home market cash discounts on a customer-specific basis. The discounts reported were determined by customer number, with separate rates reported for each customer number. *SKF's Brief* at 10. The actual payment of a cash discount usually occurred as a remittance of multiple invoices and, consequently, remittance of a discounted payment against several invoices could not be traced to a specific transaction. *Id.*

Accordingly, this Court affirms Commerce's decision to deny direct adjustments to FMV for home market billing adjustments because SKF did not report them on a transaction-specific basis and they were not a fixed and constant percentage of sales price over all sales. *See SKF USA Inc. and SKF Industrie, S.p.A.*, 19 CIT ____, ____, Slip Op. 95–6 at 22 (January 20, 1995). As to Commerce's decision to treat billing adjustments as indirect selling expenses when reported on a customer-specific basis, this Court finds, as it has done in the past, that methodology to be reasonable and in accordance with law. *See Torrington Co. v. United States*, 17 CIT ____, ____, 832 F. Supp. 365, 377 (1993), *modified, in part, remanded*, 18 CIT ____, ____, 850 F. Supp. 7 (1994). Therefore, this Court affirms Commerce's action as to this issue.

CONCLUSION

For the foregoing reasons, this case is remanded to Commerce for removal of best information available from Commerce's constructed value calculation of related party inputs. Commerce's determination is affirmed in all other respects. Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(Slip Op. 95–81)

NOTE: Pursuant to the court's Procedures for Publication of Opinions and Orders, the court's unpublished order entered on May 4, 1995 is being published by the Clerk's Office as Slip Op 95–81 on May 4, 1995.

FAG KUGELFISCHER GEORG SCHAFER AG AND FAG ITALIA S.P.A., ET AL, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–03–0033

(Dated May 3, 1995)

ORDER

TSOUCALAS, *Judge:* Upon consideration of the consent Motion of Plaintiff's FAG Kugelfischer Georg Schafer AG, FAG Italia S.p.A. and FAG Bearings Corporation for expedited remand to correct ministerial errors and the entire record herein, it is hereby

ORDERED that plaintiff's motion is granted; and it is further

ORDERED that the Department of Commerce, international Trade Administration ("ITA") is directed to correct, for FAG Germany and FAG Italy, the ministerial errors enumerated below contained in the *Final Results* of the fourth administrative review of antifriction hearings (other than tapered roller bearings) and parts thereof, published as *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et al. Final Results of Antidunping Duty Administrative Reviews, Partial Terminaticn of Administrative Reviews, and Revocaticn in Part of an Antidumping Duty Orders,* 60 FR 10900, 10959 (February 28, 1995):

1. For FAG Germany, calculate a profit on sales to related parties that failed the arm's-length test and compare this profit to the profit on sales to unrelated parties; where profit on related party sales is not significantly *less* than profit on unrelated party sales, Commerce is directed to base profit on all sales of the same *class or kind* (including related party sales) as reported by FAG Germany on the record;

2. In the calculation of CV profit for FAG Germany, deduct certain home market expenses (which are not included in the total cost of production (COP)) from net unit price (ADJPRICE), as calculated at line 37 of FAG Germany's SAS program. Amend line 37 as follows:

37: ADJPRICE=UNITPRH+OTHEREVH-QTYDISH-OTHDISH1-REBATEH-PACKMH-PACKLH-DINLFRH-DININSH-VWARSRH-PAYTHIH-OTHDISH2-DPRSFRH;

3. With respect to FAG Germany, add other revenue (OTHEREVE) to the reported unit price (UNITPPE) prior to applying the BIA rate to UNITPRE. Amend line 128 as follows:

128: REBATEE=REBATEE+((UNITPRE+OTHEREVE) *0.085);

4. With respect to FAG Germany *and* FAG Italy, remove 1993 sales made to the one U.S. customer for whom corporate rebates were reported (as identified in Exhibit 1 at line 127 (Germany) and line 161 (Italy) prior to applying the BIA rate to 1993 sales for thyse customers who received corporate rebates in 1992; and it is further

ORDERED that ITA shall publish amended *Final Results* incorporating these corrections in the Federal Register within thirty (30) days of the entry of this order; and it is further

ORDERED that all parties to this action are granted leave to file amended complaints to take into account any changes in the final results resulting from the ITA's actions pursuant to this Order, within thirty (30) days of the publication of the amended final results.

(Slip Op. 95–82)

SKF USA INC. AND SKF INDUSTRIE S.P.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

(Court No. 93–08–00498)

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record. Plaintiffs specifically contest the Department of Commerce, International Trade Administration's ("Commerce") (1) use of best information available in the calculation of constructed value; (2) requirement that the cost of material inputs obtained from related suppliers approximate arm's-length price; (3) twice adding profit with regard to inputs purchased from a related supplier, once in the calculation of constructed value for the entire subject article and again in the calculation of material costs for inputs obtained from related suppliers; (4) deduction of direct selling expenses from U.S. price in exporter's sales price comparisons; and (5) denial of an adjustment for home market cash discounts.

Held: Plaintiffs' motion for judgment upon the agency record is granted in part and this case is remanded to Commerce for removal of best information available from Commerce's constructed value calculation of related party inputs. All other issues are affirmed.

[Plaintiffs' motion is granted in part and denied in part; this case is remanded to Commerce.]

(Dated May 4, 1995)

Howrey & Simon (Herbert C. Shelley, Alice A. Kipel, Anne Talbot, Patricia M. Steele and *Juliana M. Cofrancesco)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Jeffrey M. Telep);* of counsel: *Thomas H. Fine, Michelle Behaylo, David Ross* and *Stacy J. Ettinger,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Lane S. Hurewitz, Geert De Prest and *Myron A. Brilliant)* for defendant-intervenor, The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and *Joseph A. Perna, V)* for defendant-intervenor, Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, SKF USA Inc. and SKF Industrie S.p.A. (collectively, "SKF"), commenced this action challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce" or "ITA") final results of its administrative review concerning antifriction bearings ("AFBs") (other than tapered roller bearings) and parts thereof. *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order ("Final Results")*, 58 Fed. Reg. 39,729 (July 26, 1993), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 58 Fed. Reg. 42,288 (August 9, 1993), *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 58 Fed. Reg. 51,055 (September 30, 1993), and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 59 Fed. Reg. 9,469 (February 28, 1994).

Specifically, plaintiffs contest Commerce's (1) use of best information available ("BIA") in the calculation of constructed value ("CV"); (2) requirement that the cost of material inputs obtained from related suppliers approximate arm's-length price; (3) twice adding profit with regard to inputs purchased from a related supplier, once in the calculation of constructed value for the entire subject article and again in the calculation of material costs for inputs obtained from related suppliers; (4) deduction of direct selling expenses from U.S. price ("USP") in exporter's sales price ("ESP") comparisons; and (5) denial of an adjustment for home market cash discounts.

BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders on ball bearings, cylindrical roller bearings and spherical plain bearings and parts thereof. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 20,900 (May 15, 1989).

On April 27, 1993, Commerce published the preliminary results of the subject review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 58 Fed. Reg. 25,606 (April 27, 1993).

On July 26, 1993, Commerce published the final results at issue in this case involving AFBs from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom. *Final Results,* 58 Fed. Reg. at 39,729, as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany,*

Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews, 58 Fed. Reg. 42,288 (August 9, 1993), *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 58 Fed. Reg. 51,055 (September 30, 1993), and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 59 Fed. Reg. 9,469 (February 28, 1994).

On August 24, 1993, SKF filed its summons in this case, challenging the final results with respect to Italy.

DISCUSSION

This Court must uphold final results of an ITA administrative review unless the ITA determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is defined as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed Cir. 1990).

1. *Constructed Value Calculations:*

SKF makes three arguments with regard to Commerce's calculation of constructed value. First, SKF asserts Commerce improperly resorted to best information available by increasing by eight percent all material costs for inputs obtained by related suppliers reported by SKF. Citing to the cost of production and constructed value portions of Commerce's questionnaire and its "Section D" response, as well as supplemental questionnaire and response, SKF states Commerce erred as the information allegedly not supplied by SKF had never been requested in the first place. SKF asserts it fully responded to the questions asked both in the initial questionnaire and in the supplemental questionnaire. *Brief in Support of Plaintiffs' Motion for Judgment Upon the Agency Record ("SKF's Brief")* at 11–23.

Second, SKF alleges Commerce erred in concluding that cost of material inputs obtained from related suppliers for CV purposes must approximate an arm's-length price. SKF asserts that the antidumping law does not permit the addition of an amount of eight percent for profit to approximate an arm's-length price for related supplier inputs, where transfer prices were not reported and there is nothing on the record which indicates the values reported were less than the cost of production ("COP"). 19 U.S.C. § 1677b(e)(2) and (3) (1988). SKF therefore asserts it properly reported the actual manufacturing costs incurred by related

suppliers and did not report transfer prices. Further, SKF contends not all its material inputs were obtained from related suppliers and, therefore, were already reported at arm's-length prices and should not have had their reported value increased for profit. As to these material inputs obtained from unrelated suppliers, SKF states it reported the actual prices it paid for the inputs. *SKF's Brief* at 23–29.

Third, SKF contends Commerce acted contrary to law by adding profit both in the calculation of CV for the entire subject article and in the calculation of material costs for inputs obtained from related suppliers. SKF asserts that only one addition of profit, in the calculation of CV for the entire article, should be made. SKF points out that it reported, in compliance with 19 U.S.C. § 1677b(e)(1) (1988), constructed values which included profit for each class or kind of merchandise as the greater of actual profit calculated or eight percent of the sum of material and fabrication costs and general expenses. Consequently, SKF argues it was contrary to law for Commerce to additionally increase the value of all material inputs by eight percent. *SKF's Response to the Cost of Production and Constructed Value Portions of Commerce's "Section D" Questionnaire,* Public Document No. 81 at 6; *SKF's Brief* at 29–34.

Commerce concedes that its questionnaire was unclear as to whether SKF was required to report the transfer price of related party inputs or the related party's COP of the inputs. Commerce also concedes that it neither gave any indication that SKF's response was deficient nor requested transfer prices of SKF. Consequently, Commerce requests a remand in order to remove BIA from the valuation of SKF's inputs purchased from related parties in its calculation of CV. Commerce also requests a remand to consider whether it may appropriately use transfer prices if they are higher than the costs of producing the inputs and, if necessary, to request transfer prices from SKF. Unsure of its reading of *Federal-Mogul Corp. v. United States,* 18 CIT ____, ____, 862 F. Supp. 384, 403–04 (1994), *mot. granted, remanded,* 18 CIT ____, 872 F. Supp. 1011 (1994), Commerce requests instruction from this Court as to whether the minimum eight percent profit is to be added twice in the CV calculation—once on each related party input and a second time to the total cost of all inputs. *Defendant's Memorandum in Opposition to the Motion of SKF USA, Inc. and SKF Industrie S.p.A. for Judgment Upon the Agency Record ("Defendant's Brief")* at 3–6.

Defendant-intervenor The Torrington Company ("Torrington") asserts application of BIA was appropriate because both the statute and Commerce's questionnaire required SKF to report transfer prices for related party inputs. Torrington argues the BIA chosen was reasonable and did not involve double counting. Citing *Federal-Mogul,* Torrington states Commerce merely made certain that the appropriate COP of material inputs existed before applying the statutory profit for CV calculations. Torrington also contends related party input costs require an eight percent profit adjustment so that they represent arm's-length values. *Opposition of Defendant-Intervenor The Torrington Company to the*

Motion of the Plaintiffs for Judgment Upon the Administrative Record ("Torrington's Brief") at 6–15.

Defendant-intervenor Federal-Mogul Corporation ("Federal-Mogul") agrees with the position of Torrington. *Response of Federal-Mogul Corporation, Defendant-Intervenor, to Plaintiffs' Motion for Judgment Upon the Agency Record ("Federal-Mogul's Brief")* at 4–9.

First, as to the application of BIA, this Court finds that Commerce inappropriately applied BIA. Commerce's questionnaire is ambiguous as to whether Commerce was requesting transfer prices or COP of related party inputs. *See Section D Questionnaire,* Public Doc. No. 2 at 73–74. Further, Commerce neither gave any indication that SKF's response was deficient nor requested transfer prices of SKF. Therefore, this Court remands this issue for removal of BIA from Commerce's CV calculation. *See* 19 U.S.C. § 1677e(c) (1988).

Further, the statutory provisions at issue and invoked by the parties are as follows:

> **(e) Constructed value**
>
> **(1) Determination**
>
> For the purposes of this subtitle, the constructed value of imported merchandise shall be the sum of—
>
> **(A)** the cost of materials * * *
>
> **(B)** an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade, except that—
>
> * * * * * * *
>
> **(ii)** the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost;
>
> * * * * * * *
>
> **(2) Transactions disregarded; best evidence**
>
> For the purposes of this subsection, a transaction directly or indirectly between * * * [related parties] may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available * * *.
>
> **(3) Special rule**
>
> If, regarding any transaction between * * * [related parties] involving the production by one of such persons of a major input to the merchandise under consideration, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the costs of production of such input, then the administering

> authority may determine the value of the major input on the best evidence available regarding such costs of production, if such costs are greater than the amount that would be determined for such input under paragraph (2).

19 U.S.C. § 1677b(e).

Under 19 U.S.C. § 1677b(e)(2), Commerce is granted the discretion to disregard transfer prices, if the respondent cannot demonstrate that such prices are consistent with arm's-length prices. Clearly, however, the statute can only apply if the respondent has reported or relied upon transfer prices. SKF did not report or rely upon transfer prices, but provided manufacturing costs. Thus, this part of the statute is inapplicable.

19 U.S.C. § 1677b(e)(3) is also inapplicable in this case. This provision applies where Commerce has reasonable grounds to believe or suspect that the value attributed to inputs is less than the costs of producing those inputs. Commerce has accepted cost of production as the best evidence of the value of inputs from SKF's related supplier. There is no evidence on the record and the defendant-intervenors have not presented any evidence which would suggest that the amount represented as the value of these inputs is less than the COP of the inputs.

Further, defendant-intervenors' reliance on *Federal-Mogul* is misplaced. In *Federal-Mogul*, this Court required Commerce to include the statutory minimum adjustment for profit in calculating constructed value. That instruction was based solely on 19 U.S.C. § 1677b(e)(1). After denying a profit adjustment to COP information of inputs pursuant to 19 U.S.C. § 1677b(e)(3) and disregarding arguments for a similar adjustment pursuant to 19 U.S.C. § 1677b(e)(2), the Court there stated, Commerce "is obligated to allocate profit, as well as various costs and expenses to the products under investigation. *See* 19 U.S.C. § 1677b(e)(1)." *Federal-Mogul*, 18 CIT at ____, 862 F. Supp. at 404.

In this case, it is the cost of production of inputs that is at issue. Thus, under both 19 U.S.C. § 1677b(e)(2) and (3), there is no adjustment for profit required in the calculation of COP of inputs. *See* discussion *supra*. However, in its calculation of CV, pursuant to 19 U.S.C. § 1677b(e)(1), Commerce must make the necessary adjustment for profit, as was done in *Federal-Mogul*. *See Federal-Mogul*, 18 CIT at ____, 862 F. Supp. at 404. As required by 19 U.S.C. § 1677b(e)(1), a minimum of eight percent profit has already been added to SKF's general expenses and cost of manufacture on the CV calculated for all subject merchandise. *SKF's Response to the Cost of Production and Constructed Value Portions of Commerce's "Section D" Questionnaire*, Public Document No. 81 at 6.

Finally, this Court does not reach the issue of whether Commerce is required to prefer, when considering related party inputs, the transfer price if it is greater than the COP. In this case, Commerce has chosen COP and SKF has provided the requested information. As the choice of COP is in accordance with law and supported by substantial evidence, this Court will not remand this issue merely for Commerce to reconsider its choice in this case.

Accordingly, this issue is remanded only for Commerce to remove best information available from Commerce's constructed value calculation of related party inputs (its increase of SKF's value for inputs by a factor of eight percent for profit), leaving untouched its profit adjustment to the total constructed value made under 19 U.S.C. § 1677b(e)(1)(B)(ii). *See SKF USA Inc., SKF France, S.A. and SARMA v. United States,* 19 CIT ____, ____, Slip Op. 95–67 at 12 (April 19, 1995).

2. *U.S. Direct Selling Expenses:*

SKF asserts Commerce erred in treating SKF's U.S. direct selling expenses as a reduction to U.S. price rather than an addition to foreign market value on exporter's sales price sales. SKF states direct selling expenses should be added to FMV as a matter of law and Commerce acted contrary to the statute and to explicit direction from this Court in deducting them from USP. *SKF's Brief* at 34–36.

While conceding that this Court has ruled adversely to its position on this point, Commerce contends it has acted consistently with 19 U.S.C. § 1677a(e)(2) (1988), rather than adding direct selling expenses to FMV pursuant to the circumstance of sale adjustment contained in 19 U.S.C. § 1677b(a)(4)(B) (1988). Commerce points out its policy has recently been vindicated by the Federal Circuit in *Koyo Seiko Co., Ltd. and Koyo Corp. of U.S.A. v. United States,* 36 F.3d 1565 (Fed. Cir. 1994), *on remand, remanded,* 1994 CIT LEXIS 213 (1994). *Defendants' Brief* at 6–8.

Citing *Koyo Seiko,* the defendant-intervenors support Commerce's position. *Torrington's Brief* at 16; *Federal-Mogul's Brief* at 9–10.

The Federal Circuit explained Commerce's practice as follows:

> Commerce's practice evidences an attempt to make mirror-image adjustments to foreign market value and exporter's sales price so that they can be fairly compared at the same point in the chain of commerce. The procedure is as follows: In an exporter's sales price transaction, after an initial exporter's sales price is calculated, that value is adjusted, *inter alia,* pursuant to section 1677a(e)(2) by deducting therefrom all selling expenses (both direct and indirect) incurred in making U.S. sales. Then, in determining an initial foreign market value, appropriate sales are identified in the home market or third country pursuant to 19 U.S.C. § 1677b(a). Next, the initial foreign market value is adjusted, *inter alia,* by deducting therefrom a "circumstances of sale" amount to account for "any difference between the United States price and the foreign market value," 19 U.S.C. § 1677b(a)(4), for example, direct selling expenses incurred in making home market sales. In this way, the section 1677b(a)(4) adjustment to foreign market value counterbalances the section 1677a(e)(2) adjustment to exporter's sales price. As a result, the two parameters may be compared on equivalent terms.

Koyo Seiko, 36 F.3d at 1573.

The Federal Circuit went on to specifically uphold Commerce's reading of the statute:

> Nothing in the plain language or the legislative history of the Antidumping Act precludes Commerce's approach of adjusting exporter's sales price by deducting therefrom certain direct selling expenses incurred in the United States. Indeed, Commerce's stated rationale for its approach is well within the bounds of reasonableness. Moreover, because we recognize that Commerce is "the 'master' of the antidumping law, worthy of considerable deference," *Daewoo Elecs.*, 6 F.3d at 1516, we defer to its approach.

Id. at 1575.

Accordingly, as the law is now clear that Commerce's methodology of adjusting United States price for selling expenses, both direct and indirect, incurred with respect to ESP sales, is reasonable and in accordance with law, this Court affirms Commerce on this issue. *See SKF USA Inc., SKF France, S.A. and SARMA v. United States,* 19 CIT at ____, Slip Op. 95–67 at 14.

3. *SKF Home Market Cash Discounts:*

SKF contends that Commerce's rejection of SKF's cash discounts by two of its business units, Industrie and Speciali, on home market sales as an adjustment to foreign market value is contrary to law since the discounts were verified and appropriately allocated over net sales. SKF states Commerce unreasonably deviated from its methodology in the preliminary results. SKF argues that, at minimum, Commerce should treat the discounts as an indirect adjustment to FMV as it typically has done with expenses disallowed as direct expenses. SKF asserts it has allocated these discounts on a customer-specific basis. *SKF's Brief* at 36–43.

Industrie and Speciali do not offer a formal cash discount program. The home market cash discounts reported by Industrie and Speciali represented underpayments by some customers on certain invoices. Where the difference between the amount outstanding and the payment was insignificant, Industrie and Speciali's business practice was to accumulate the underpayments generically in their general ledgers as a net cash discount on sales. The discounts were not recorded in an transaction– or customer-specific manner. The cash discount rate reported was calculated as total cash discounts divided by total net domestic sales for each company. *SKF's Brief* at 10; *SKF's Home Market Sales Response,* Public Document No. 74 at 49.

Commerce asserts its denial of both direct and indirect adjustments was proper because SKF failed to report the claimed discounts on an actual sales-specific or customer-specific basis. Commerce states it generally does not permit the allocation of discounts, but instead requires that they be reported on a transaction-specific basis. Commerce emphasizes that it does not permit the allocation of discounts across all sales because such a practice distorts actual prices for each specific sale: sales for which a discount was incurred will be allocated less of the discount

than was actually incurred and sales for which no discount was incurred will nonetheless be allocated a portion of the total discounts. *Defendant's Brief* at 8–14.

In addition, Commerce asserts that these companies did not have cash discount programs at all. Commerce states that when these companies had been underpaid by certain customers, the companies referred to the amount by which they had been underpaid as "cash discounts." Commerce asserts such underpayments are not properly considered cash discounts. *Id.* at 11.

Torrington and Federal-Mogul agree with the arguments made by Commerce and request that the Court affirm Commerce's action. *Torrington's Brief* at 16–18; *Federal-Mogul's Brief* at 10–11.

Commerce explained its methodology in the Final Results:

> [D]iscounts, rebates, or price adjustments based on allocations are not allowable as direct adjustments to price. Allocated price adjustments have the effect of distorting individual prices by diluting the discounts or rebates received on some sales, inflating them on other sales, and attributing them to still other sales that did not actually receive any at all * * *.
>
> Therefore, we have made direct adjustments for reported home market discounts, rebates, and price adjustments if (a) they were calculated on a transaction-specific basis and were not based on allocations, or (b) they were granted as a fixed and constant percentage of sales on all transactions for which they are reported. If these adjustments were not fixed and constant but were allocated on a customer-specific or a product-specific basis, we treated them as indirect selling expenses. We did not accept discount or rebate amounts based on allocations unless the allocations calculate the actual amounts for each individual sale.

Final Results, 58 Fed. Reg. at 39,759.

Upon consideration of the administrative record, this Court finds that in the case of both Industrie and Speciali, SKF's allocation of discounts fails to distinguish those sales for which cash discounts were granted from those for which cash discounts were not granted.

Commerce makes adjustments for discounts and rebates pursuant to 19 U.S.C. § 1677a (1988) and 19 U.S.C. § 1677b (1988), which require it to determine what price was actually charged for subject merchandise. *See Torrington Co. v. United States,* 17 CIT ____, ____, 818 F. Supp. 1563, 1578–79 (1993). More specifically, the Federal Circuit has held that, to allow an adjustment to FMV, it must be directly correlated with specific in-scope merchandise on the basis of actual costs. *Smith-Corona Group v. United States,* 713 F.2d 1568, 1580 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984).

Because it failed to report its claimed cash discounts on a customer-specific or transaction-specific basis, SKF cannot be allowed a direct or an indirect adjustment to FMV for home market cash discounts. *See Torrington Co. v. United States,* 17 CIT ____, 850 F. Supp. 1 (1993). Thus, this Court does not reach the issue of whether underpayment by

certain customers constitutes a cash discount and hereby affirms Commerce's actions on the basis of SKF's allocation methodology.

CONCLUSION

For the foregoing reasons, this case is remanded to Commerce for removal of best information available from Commerce's constructed value calculation of related party inputs. Commerce's determination is affirmed in all other respects. Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(Slip Op. 95–83)

INTEL SINGAPORE, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–12–00624

[U.S. Customs Service's classification affirmed.]

(Decided May 4, 1995)

Rode & Qualey (John S. Rode and *Eleanore Kelly-Kobayashi)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(John J. Mahon), Stephen Berke,* Office of the Assistant Chief Counsel, United States Customs Service, of counsel, for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Chief Judge:* Plaintiff, Intel Singapore, Ltd. (Intel) seeks to overturn the U.S. Customs Service's classification of certain imported merchandise. Customs classified the merchandise under Item 676.15, Part 4, Schedule 6, of the Tariff Schedules of the United States (TSUS) (1987), as "[a]ccounting, computing, and other data-processing machines."[1] Intel claims the merchandise is properly classifiable under Item 676.54, Part 4, Schedule 6, TSUS (1987), as "[p]arts of automatic data-processing machines and units thereof, other than parts incorpo-

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1 SCHEDULE 6—METALS AND METAL PRODUCTS

PART 4—MACHINERY AND MECHANICAL EQUIPMENT

* * * * * * *

Calculating machines; accounting machines, cash registers, postage-franking machines, ticket-issuing machines, and similar machines, all the foregoing incorporating a calculating mechanism:

676.15 Accounting, computing, and other data-processing machines ..... 3.9% ad val.

rating a cathode ray tube."[2] The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988). The court finds the Boards possess the capability to perform the functions necessary for their classification as a computing machine and affirms Customs' classification of the merchandise under Item 676.15, TSUS.

BACKGROUND

In 1988, Intel imported eleven models of populated printed circuit board products from Singapore into the United States. There are three types of Boards at issue: (1) central processing unit boards (CPU Boards); (2) local area network interface boards (LAN Boards); and (3) accelerator boards (Inboards) (collectively "Board(s)"). Each Board consists of a single printed circuit board populated with electronic components. (Pretrial Order, Schedule C, Uncontested Facts, ¶ 7.) A marketable "computing unit," to be of optimal use to the consumer, contains a number of Boards, in addition to other components such as a monitor, a keyboard, a hard drive, a disk drive, a chassis, a power supply, a cooling system, cables, connectors, and fasteners. (R. at 17–29.) Additional memory and software is routinely installed as part of a computer setup. (R. at 108.)

The three types of Boards at issue perform separate functions. The CPU Boards direct execution of commands pursuant to fixed programs, installed after sale, which interpret, translate, and manipulate data. (Def.'s Ex. W, IEEE Standard Dictionary of Electrical and Electronics Terms, at 93); *(see also* Pl.'s Ex. 4, OEM Boards and Systems Handbook, at 3–54 – 3–62) (noting capabilities of iSBC 86/35 CPU board.) The LAN Boards facilitate communication between two or more personal computers by setting standards that describe how nodes are connected and what protocol should be followed in transferring data between otherwise incompatible personal computers. (R. at 67–69); Van Nostrand's Scientific Encyclopedia 1728 (7th ed. 1989); *(see also* Pl.'s Ex. 3, OEM Systems Handbook, at 8–12 – 8–23) (noting capabilities of iSBC 186/51 LAN Board.) This permits multiple personal computers to share resources such as printers and mass storage devices. *See id.* Inboards are accelerator boards that supplement the existing personal computer architecture. (R. at 76.) They replace the original microprocessors in a personal computer, performing functions similar to those performed by the CPU Boards, and improve the computer's memory and computational speed. *Id.* All Boards contain a processor, (R. at 192), which governs the interpretation and execution of instructions pertinent to the Boards' function, (Def.'s Ex. W at 93.)

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2 SCHEDULE 6—METALS AND METAL PRODUCTS

PART 4—MACHINERY AND MECHANICAL EQUIPMENT

* * * * * * *

Office machines not specially provided for (con.):

* * * * * * *

676.54 Parts of automatic data-processing machines and units thereof, other than parts incorporating a cathode ray tube ..... Free.

Customs classified the CPU Boards and the Inboards as "computing" or "other data-processing machines" under Item 676.15, TSUS, assessing a duty of 3.9% *ad valorem*. It now claims the LAN Boards are also properly classified under Item 676.15, TSUS, and has abandoned its original classification for those Boards under Item 684.67, TSUS, as "[e]lectrical telegraph (including printing and type-writing) and telephone apparatus and instruments, and parts thereof: Other: Other." Item 684.67, Part 5, Schedule 6, TSUS (1987). Intel claims the Boards are properly classifiable as "[p]arts of automatic data-processing machines and units thereof, other than parts incorporating a cathode ray tube, duty free" under Item 676.54, TSUS. Intel seeks an order requiring Customs to reliquidate the Boards and refund duties paid. Trial was held in Portland, Oregon.

DISCUSSION

The court reviews Customs' classification *de novo*, *National Advanced Systems v. United States*, 12 Fed. Cir. (T) ____, ____, 26 F.3d 1107, 1109 (1994), with the presumption that Customs' classification of the imported merchandise is correct; Intel bears the burden of overcoming this presumption.[3] 12 Fed. Cir. (T) at ____, 26 F.3d at 1109–10; *Marcel Watch Co. v. United States*, 11 Fed. Cir. (T) ____, ____, 11 F.3d 1054, 1056 (1993); *see also* 28 U.S.C. § 2639(a)(1) (1988).

Intel's chief contention is that the Boards do not function as "computers," and therefore are not properly classified as such.[4] According to Intel, the Boards are of no use to consumers unless they are connected to other devices; accordingly, they must be classified as "*parts* of automatic data-processing machines and units thereof." Item 676.54, TSUS. Intel seeks to distinguish *National Advanced Systems*, which the government argues is controlling here, from the instant case. In *National Advanced Systems* the Federal Circuit, in affirming the Court of International Trade, found the processing unit at issue was properly classified as a computer even though, by itself, it could not perform useful work. 12 Fed. Cir. (T) at ____, 26 F.3d at 1110.

The merchandise imported in *National Advanced Systems* was an "Additional Instruction Processor" (AIP), a component utilized to upgrade the Hitachi R-9 line of mainframe computers by giving the mainframe multitasking and parallel processing capability. *National Advanced Sys.*, 12 Fed. Cir. (T) at ____, 26 F.3d at 1108. Like the Boards, the AIP could not perform useful work until placed within the main-

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[3] With regard to the LAN Boards, the government has abandoned its classification under Item 684.67, TSUS in favor of Item 676.15, TSUS. Accordingly, the presumption of correctness does not apply to the government's proposed classification of the LAN Boards. (*See* R. at 3.)

[4] Intel also argues, in its Reply, that the Boards are not "machines" within the meaning of Item 676.15, TSUS. Intel contends "to be a machine, the article must have some movable parts and 'it must utilize, apply, or modify force, or be used for the translation of motion.'" (Pl.'s Post Trial Reply Br. at 13 (quoting *APF Elecs. Inc. v. United States*, 82 Cust. Ct. 25, 29, C.D. 4784 (1979)).)

Intel defines "machine" out of context. The question is not if the device is a "machine;" it is, rather, if the merchandise is classifiable as a "computing machine." In the English language, the terms "computer" and "computing machine" are synonymous. *See Webster's Third New International Dictionary* 468 (1981 ed.). As the court noted in *National Advanced Systems*, "a computer is a type of computing machine. Thus, if the [device] meets the definition of a computer, it also satisfies the description 'computing machine' under Item 676.15." *National Advanced Systems*, 12 Fed. Cir. (T) ____, ____, 26 F.3d 1107, 1109 n.3 (1994).

frame system. The AIP was "structurally and functionally similar to the R-9's primary instruction processor;" its function was to enhance the mainframe's existing processing capacity. 12 Fed. Cir. (T) at ____, 26 F.3d at 1108.

According to Intel, the two products are distinct. Intel cites differences in size, cost, structure, use, environment, and that the AIP appeared to have been finished, physically ready for use in the performance of computations, while the Boards must be further manufactured and assembled to become useful. As to this latter argument, Intel contends the lack of a Read-Only Memory Basic Input/Output System (ROM BIOS) on the Boards—individualized fixed software instructions programmed on the processor from which the computer takes its initial commands—precludes comparison between the Boards and the AIP.

These arguments are unpersuasive. "Item 676.15 is an eo nomine designation which includes all forms of the article." *National Advanced Sys.*, 12 Fed. Cir. (T) at ____, 26 F.3d at 1111 (quoting *Hasbro Indus. v. United States*, 7 Fed. Cir. (T) 110, 112, 879 F.2d 838, 840 (1989)). It is not confined by particular specifications such as the type or amount of memory, input/output capacity, or processing power. *See National Advanced Sys.*, 17 CIT 641, 644 (1993), *aff'd*, 12 Fed. Cir. (T) ____, 26 F.3d 1107 (1994); *see also Burroughs Corp. v. United States*, 11 CIT 291, 297, 664 F. Supp. 507, 513 (1987), *aff'd*, 6 Fed. Cir (T) 117, 845 F.2d 321, *cert. denied*, 488 U.S. 854 (1988) (noting large amount of memory or storage capacity unnecessary for classification under Item 687.15, TSUS). The AIP performs essentially the same role as a processor chip found in personal computers. *National Advanced Sys.*, 17 CIT at 642. Therefore, while the AIP may be distinguished as "a large machine weighing hundreds of pounds, and comprised of many components," *id.*, the AIP is undifferentiated from the Boards in their fundamental purpose—to compute.

Moreover, that the fixed instructions (ROM BIOS) have yet to be installed does not preclude the Court from concluding that the Boards compute. *(See* R. at 179) (noting first general purpose computer lacked stored program capability). The court explores, rather, the fundamental *capabilities* of the Boards once such instructions—like other types of software—are in place. *See generally Nord Light, Inc. v. United States*, 49 C.C.P.A. 12, 15, C.A.D. 786 (1961) (noting no requirement of self-activation for classification as machine); *(see also* R. at 203) (defining ROM BIOS as part of software provided to make programming easier by end user). Accordingly, the reasoning applied to uphold the classification of the AIP in *National Advanced Systems* applies with equal force to the classification of the Boards.

The Federal Circuit in *National Advanced Systems* found "the term 'computing machine' in Item 676.15 does not require stand-alone capability." *National Advanced Systems*, 12 Fed. Cir. (T) at ____, 26 F.3d at 1111. Accordingly, whether Intel's Boards need be attached to other components to be "useful" is irrelevant. 12 Fed. Cir. (T) at ____, 26 F.3d

at 1111; *see Burroughs Corp.*, 11 CIT at 297, 664 F. Supp. at 513 (noting need to install keyboard, monitor, and other peripherals in order to create usable consumer product immaterial). The court does not agree with plaintiff's assertion that, for a computer to be as classified under Item 676.15, TSUS, it must be a completed product as found upon a showroom wall. The concepts of both computer and consumer are not static, and are not relevant to the classification process. The basic inquiry is whether the Boards compute.

For a device to compute, it must be capable of accepting information, applying prescribed processes to the information upon execution of commands from the user, and supplying the user with the results of these processes. *See National Advanced Sys.*, 12 Fed. Cir. (T) at ____, 26 F.3d at 1111. Further, nearly all the definitions have in common that, at the most fundamental level, a device is a computer if it is capable of carrying out calculations. 12 Fed. Cir. (T) at ____, 26 F.3d at 1111–12. The Court therefore looks to see whether the Boards perform these functions.

These functions are clearly present in each of the Boards. The Boards are capable of accepting information through serial and parallel interfaces, (R. at 194–95); *(see also* Pl.'s Ex. 5, iSBC 86/35 Single Board Computer Reference Manual, at 1–4, 1–6) (noting CPU board input-output capabilities); (Pl.'s Ex. 3 at 8–12, 8–14, 8–17—8–19) (providing iSBC 186/51 LAN board input-output capability); (R. at 76–77) (detailing Inboard's input-output capabilities), and storing that data along with the instructions needed to process the information in memory. (R. at 192–200); *(see* Pl.'s Ex. 4 at 3–55) (detailing iSBC 86/35 CPU board's memory capabilities and capacity); (Pl.'s Ex. 3 at 8–14) (noting iSBC 186/51 LAN board's memory capabilities and capacity). There is no requirement that the Boards possess direct input/output capacity, or permanent memory. *National Advanced Sys.*, 12 Fed. Cir. (T) at ____, 26 F.3d at 1112. The microprocessor on all three Boards performs fundamental calculations and manipulates information. (R. at 78–79, 192–200); *(see* Pl.'s Ex. 4 at 3–55) (noting Numeric Data Processor on iSBC 86/35 CPU board offers "arithmetic, trigonometric, transcendental, logarithmic, and exponential instructions"); *(see also* Pl.'s Ex. 3 at 8–12, 8–14) (noting iSBC 186/51 LAN board provides "an economical self-contained computer for applications in processing [including arithmetic functions] and local area network control). The LAN Board—interconnecting multiple computers and their peripherals—computes through its transformation and orchestration of the data it administers as well as through implementing user applications. (R. at 196–98); *(see also* Pl.'s Ex. 3 at 8–13—8–14) (noting that iSBC 86/51 LAN Board serves both "computational and networking capacities"). The Boards return the transformed data through their respective input-output interfaces. (R. at 76–77, 194–95); *(see* Pl.'s Ex. 5 at 1–4, 1–6); (Pl.'s Ex. 3 at 8–12, 8–14, 8–17—8–18).

Accordingly, the court holds the Boards are devices capable of computing and satisfy the broad language of Item 676.15, TSUS.

CONCLUSION

The court finds the Boards are properly classifiable under Item 676.15, TSUS. Plaintiff has not overcome the presumption of correctness with regard to Customs' classification of the Inboards and the CPU Boards. The court further finds the LAN Boards are properly classified under Item 676.15, TSUS.

PUBLIC VERSION

(Slip Op. 95–84)

FORMER EMPLOYEES OF SWISS INDUSTRIAL ABRASIVES, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 92–08–00547

[Plaintiffs' renewed motion for judgment on the agency record is denied. Judgment entered for defendant.]

(Dated May 5, 1995)

Naida Thomas, pro se, for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Rhonda K. Schnare),* for defendant.

MEMORANDUM AND ORDER

GOLDBERG, *Judge:* This action comes before the court on plaintiffs' renewed motion for judgment on the agency record. The court previously remanded this action to the United States Department of Labor ("Labor") with instructions to reconsider plaintiffs' petition for certification of eligibility for trade adjustment assistance ("TAA"). *Former Employees of Swiss Industrial Abrasives v. United States,* 17 CIT ___, 830 F. Supp. 637 (1993) *("Swiss Abrasives I").* After conducting a new investigation pursuant to the court's instructions in *Swiss Abrasives I,* Labor returned a negative determination denying plaintiffs' petition for certification of eligibility for TAA. Plaintiffs now contest Labor's remand determination. The court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(d)(1) (1988).

BACKGROUND

On January 16, 1992, Ms. Naida Thomas, President of Local 411 of the International Chemical Workers Union, filed a petition for certification of eligibility for TAA with the Office of Trade Adjustment Assistance, U.S. Department of Labor, on behalf of all the former workers of Swiss Industrial Abrasives, Alliance, Ohio ("SIA Ohio"). *Public Record* at 2.

The petition stated that the employees produced abrasives in all forms, including various belts, sheets, discs, rolls, and jumbo rolls at the SIA Ohio plant. *Id.* The petition also stated that layoffs began at the plant in December 1990, and that 165 hourly workers and management would be released by the scheduled closing of the plant on February 4, 1992. *Id.* The petition alleged that the plant was closing because of increased imports from SIA Ohio's parent company, Swiss Industrial Abrasives of Switzerland ("SIA Switzerland"). *Id.*

In response to plaintiffs' petition, Labor initiated an investigation of the SIA Ohio plant. The period of investigation relevant to the petition was 1990 and 1991. *See Public Record* at 14–17. Labor discovered that a domestic abrasives manufacturer, Sancap Abrasives, Inc. of Alliance, Ohio ("Sancap") had expressed interest in acquiring the SIA Ohio plant. *Id.* at 23. Labor obtained a copy of an Agreement for Sale & Purchase of Business Assets ("Sale Agreement") in connection with the proposed purchase of SIA Ohio's assets by Sancap, which was dated December 31, 1991.[1] Labor also obtained a copy of a Distribution Agreement between SIA Switzerland and Sancap. [

] *Confidential Record* at 29–46. The SIA Ohio plant ultimately closed on February 4, 1992, and Sancap subsequently assumed operation of the plant.

In addition, Labor conducted a survey of three former customers of SIA Ohio, in which it collected import information for 1990 and 1991. This survey indicated to Labor that these former customers had not substituted imported abrasives for purchases from SIA Ohio in 1990 or 1991. *Public Record* at 23; *see also Confidential Record* at 47–54. Relying primarily on the survey, Labor concluded that the third criterion of § 222 of the Trade Act of 1974, which requires that increases in imports "contribute[ ] importantly" to the layoffs, had not been satisfied. *Public Record* at 56. Consequently, on April 14, 1992, Labor determined that the workers formerly employed at SIA Ohio were not eligible to receive worker assistance and issued a Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance. *See Determination Regarding Eligibility to Apply for Worker Adjustment Assistance,* 57 Fed. Reg. 15,331 (Apr. 27, 1992).

On April 21, 1992, petitioners filed a request for administrative reconsideration of Labor's notice of negative determination. *Public Record* at 60–61. Petitioners stated that, before 1980, SIA Ohio had manufactured all of its own products. *Id.* at 60. After SIA Ohio was purchased by SIA Switzerland, however, petitioners alleged that SIA Ohio began to import more and more products until the plant closed on February 4, 1992. *Id.*

In response to petitioner's request for reconsideration, Labor obtained statistical information regarding imports and sales from SIA Switzerland and Sandcap. The information provided by SIA Switzerland indicated to labor that: [

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[1] The Sale Agreement is contained in the *Confidential Record* at 27–28.

]. *Confidential Record* at 66. Based on information from SIA Switzerland and its prior survey, Labor denied petitioners' request for rehearing on July 24, 1992. *SIA of America, Alliance, Ohio; Negative Detrermination Regarding Application for Reconsideration,* 57 Fed. Reg. 34,318 (Aug. 4, 1992).

Petitioners then filed a motion for judgement on the agency record with this court. Upon review, the court found several inadequacies in the statistical information obtained by Labor from SIA Switzerland. *See Swiss Abrasives I,* 17 CIT ____, 830 F. Supp. at 641–42. The court also found that, although the Sale and Distribution Agreements comprised much of the material in the administrative record, Labor failed to analyze them fully. In particular, Labor failed to explore whether there was an overall market strategy by SIA Switzerland to gradually phase out domestic production in favor of imports. *See id.*

The court therefore remanded plaintiffs' action and instructed Labor to reexamine petitioners' claim that imports from SIA Switzerland of like or competitive products caused production and employment to fall at the SIA Ohio plant. Upon remand, Labor was instructed to: (1) analyze verified import and production data, based on volume rather than value, that was sufficiently broken down along product lines to reflect the impact of imports from SIA Switzerland upon production at SIA Ohio; and (2) take into account the Sale and Distribution Agreements contained in the record. *Swiss Abrasives I,* 17 CIT at ____, 830 F. Supp. at 642.

On remand, Labor collected additional information from Sancap concerning SIA Ohio's production, sales, and imports.[2] Based on the results of its remand investigation, Labor affirmed its initial negative determination on November 22, 1993. *Supplemental Public Record* at 43–47. Thereafter, plaintiffs renewed their motion for judgement upon the agency record. Upon review, the court denies plaintiffs' motion for judgment on the agency record and affirms Labor's negative determination.

DISCUSSION

The question presented to the court is whether Labor's negative remand determination is supported by substantial evidence and is otherwise in accordance with law. *Former Employees of General Elec. Corp. v. United States Dep't of Labor,* 14 CIT 608, 611 (1990) (citations omitted). Substantial evidence is more than a mere scintilla; it is suh evidence that reasonably supports a conclusion. *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). An assessment of the substantiality of record evidence must take into account whatever else in the record evidence must take into account whatever else in the record fairly detracts from its weight. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951). Thus, the court must consider the record as a whole. *See id.*

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[2] These statistics are contained in the *Supplemental Confidential Record* at 28–33.

To certify a group of workers as being eligible for TAA, Labor must determine:

> **(1)** that a significant mumber or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> **(2)** that sales or production, or both, of such firm or subdivision have ecreased absolutely, *and*
>
> **(3)** that increases of imports of articles like or directly competitive with articles produed by suh workers' firm or an appropriate subdivision thereof *contributed importantly* to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272(a) (1988) (emphasis added). The phrase "contributed importantly" is defined as "a cause which is important but not necessarily more important than any other cause." 19 U.S.C. § 2272(b)(1) (1988).

Pursuant to the instructions of this court in *Swiss Abrasives I*, Labor obtained additional production and sales data from SIA Switzerland and Sancap. Labor determined from this data that increases in imports of abraisive materials did not contribute importantly to worker separations. Hence, Labor denied plaintiffs' application for certification. Upon review, the court concludes that Labor's remand determination is supported by substantial evidence on the record and otherwise in accordance with law.

Statistical information from Sancap indicates that imports declined absolutely in every major product line during the period of investigation. *Supplemental Public Record* at 46. For example, between 1990 and 1991 the volume of imported wide belts declined from approximately [ ] reams to [ ] reams, and the volume of imported rolls declined from approximately [ ] reams[3] to [ ] reams. *Supplemental Confidential Record* at 31–32. Import volumes of narrow belts, sheets, discs, and specialty items similarly declined. *Id.*

The statistics provided by Sancap also show that the percentage of imports to sales declined for every major product line during the period of investigation, with the exception of discs. *Supplemental Confidential Record* at 31–32. For example, imports of wide belts comprised [ ] percent of sales in 1990, but only [ ] percent in 1991. *Id.* at 32. Similarly, imported rolls accounted for [ ] percent of sales in 1990, but only [ ] percent in 1991. *Id.* Although the percentage of imports of discs to sales did not decline, discs accounted for less than [ ] percent of sales in 1990 and less than [ ] percent of sales in 1991. *Id.*

Furthermore, record evidence indicates that Sancap produces a higher volume of products than SIA Ohio did before its close, and that Sancap's long-term strategy is to *increase* domestic production. *Supplemental Public Record* at 46. Specifically, [

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[3] One ream equals 47,520 square inches.

In sum, upon remand Labor found that: (1) imports of abrasives decreased absolutely for every major product line in 1991 compared to 1990; (2) except for discs, the percentage of imports to sales declined for every major product line in 1991 compared to 1990; (3) Sancap reported increased sales and production in 1992 when compared to SIA Ohio's sales and production in 1991; and (4) Sancap has plans to further increase domestic production.

Notwithstanding all such record evidence, plaintiffs contend that the Petition Verification performed by the Office of Trade Adjustment Assistance on January 27, 1992, evidences SIA Ohio's intent to abandon domestic production in favor of imports. Question 7a of the Petition Verification asks whether SIA Ohio imports any products. *Public Record* at 7. The answer provided is "yes," with a notation adding, "will go to 100%." *Id.* Plaintiffs, however, point to no information in the record to support the assertion that imports have in fact gone to 100 percent, or that imports increased during the period of investigation. Indeed, as discussed above, the statistics provided by Sancap indicate that imports actually decreased during the period of investigation, both absolutely and as a percentage of sales. Consequently, the Sancap statistics completely refute the unsubstantiated assertion contained in the Petition Verification that SIA Ohio intended to increase imports to 100 percent.

Plaintiffs also note that [
]
Confidential Record at 32.

Plaintiffs further note that [
][4]
Confidential Record, Distribution Agreement ¶ 2(c). [
] overall market strategy. As a result, the court finds plaintiffs' reliance upon ¶ 2(c) in the Distribution Agreement unvailing.]

Finally, plaintiffs contend that Labor was unable to collect accurate data. In particular, plaintiffs argue that Labor was misled by Sancap President Robert Stuhlmiller's statement that all SIA Switzerland and Sancap products bore country of origin markings. Plaintiffs allege that some products were not so marked, and that therefore all of the information supplied by Sancap should be discredited. Although the record is unclear as to whether Mr. Stuhlmiller's statement was completely accurate, the court finds the inference drawn by plaintiffs from the record to be entirely unwarranted.

CONCLUSION

Upon review, the court finds that Labor's determination is supported by substantial evidence and is otherwise in accordance with law. For the foregoing reasons, it is hereby ORDERED that plaintiffs' renewed motion for judgment on the agency record is DENIED. Judgment will be entered accordingly.

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[4] [*Confidential Record,* Distribution Agreement ¶ 1(a).

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